Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States

ARKANSAS DEPARTMENT OF EDUCATION,
Petitioner,

v.

JIM C, INDIVIDUALLY AND AS PARENT AND NEXT FRIEND OF J.C., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Congress may constitutionally compel a state agency, as a condition for receiving any federal funding for any purpose, to waive its Eleventh Amendment immunity from suits under Section 504 of the Rehabilitation Act of 1973.

PARTIES TO THE PROCEEDINGS

Petitioner is the Arkansas Department of Education. Respondents are Jim C. (individually and as parent and next friend of J.C.), Susan C. (individually and as parent and next friend of J.C.), and the United States. Other parties in the district court proceedings included the Atkins (Arkansas) School District and the Arch Ford Education Service Cooperative.

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The Arkansas Department of Education respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1a) is reported at 235 F.3d 1079. The panel opinion of the court of appeals (Pet. App. 16a) is reported at 189 F.3d 745. The order of the district court (Pet. App. 39a) is unreported.

JURISDICTION

The court of appeals entered its judgment on December 22, 2000. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

Article I, Section 8, Clause 1 of the United States Constitution states:

> The congress shall have power
>
> To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States . . . .

The Eleventh Amendment to the United States Constitution states:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

STATUTORY PROVISIONS

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, states in relevant part:

> Nondiscrimination under Federal grants and programs
>
> (a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

(b) "Program or activity" defined

For the purposes of this section, the term "program or activity" means all of the operations of -

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government . . . .

42 U.S.C. § 2000d-7(a) states in relevant part:

Civil rights remedies equalization

(a) General provision

(1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794), title IX of the Education Amendments of 1972 (20 U.S.C. § 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. Sec. 6101 et seq.), title VI of the Civil Rights Act of 1964 (42

U.S.C. § 2000d et seq.), or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

(2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

STATEMENT OF THE CASE

This case presents fundamental questions about the scope of congressional power under the Spending Clause of the Constitution (Art. I, § 8, cl. 1). In *South Dakota v. Dole*, 483 U.S. 203 (1987), this Court held that, while Congress generally may attach conditions to the receipt of funds under federal spending programs, those conditions must be "related" or "germane" to the purpose of the expenditure, *id.* at 207-09 & n.3, and, in addition, must not "be so coercive as to pass the point at which 'pressure turns into compulsion,'" *id.* at 211 (citation omitted). By a six-to-four vote, the Eighth Circuit in this case, sitting en banc, held that these Spending Clause limitations were not transgressed by a federal requirement that a state agency, in order to receive any federal funding for any purpose, must waive its Eleventh Amendment immunity from suits under section 504 of the Rehabilitation Act of 1973. Under the court of appeals' decision, petitioner, the Arkansas Department of Education, must either waive this constitutional immunity or lose some $250 million in federal funding, the vast majority of which has nothing to do with section 504's goal of eliminating discrimination against the handicapped.

1. Respondents Jim C. and Susan C. are the parents of J.C., an autistic child. Dissatisfied with the education provided to J.C., respondents sued petitioner and two other parties in

federal district court. Among other claims, respondents alleged violations of section 504 of the Rehabilitation Act of 1973, which provides in pertinent part that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a).[1] Respondents sought money damages, and petitioner interposed an Eleventh Amendment defense. The district court rejected the defense on the ground that 42 U.S.C. § 2000d-7(a)(1), which provides in pertinent part that "[a] State shall not be immune under the Eleventh Amendment . . . from suits in Federal court for a violation of section 504 of the Rehabilitation Act of 1973," constituted a valid congressional abrogation of the defense. Pet. App. 31a.

2. On appeal, a panel of the Eighth Circuit unanimously reversed in relevant part and ordered the dismissal of respondents' section 504 claims. Applying *City of Boerne v. Flores*, 521 U.S. 507 (1997), and its progeny, the panel concluded that the purported abrogation of Eleventh Amendment immunity exceeded the scope of congressional power under section 5 of the Fourteenth Amendment. Pet. App. 23a-27a. The panel also rejected respondents' alternative theory that, in light of section 504, petitioner had voluntarily waived its Eleventh Amendment immunity by accepting federal funds. Pet. App. 27a-29a.

Specifically, the panel concluded that section 504 was not a valid exercise of Congress's spending power because the conditions it imposed were both coercive and unrelated to the purpose of the Rehabilitation Act. The panel reasoned that

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[1] The district court had subject matter jurisdiction under 28 U.S.C. § 1331.

> Congress's imposition of such conditions on a state violates the Constitution because it amounts to impermissible coercion: Arkansas is forced to renounce *all* federal funding, including funding wholly unrelated to the RA [Rehabilitation Act], if it does not want to comply with § 504. Congressional imposition of such a condition does not give Arkansas, or any other state, a meaningful choice regarding whether to receive federal funding and waive its Eleventh Amendment immunity to suits arising under § 504 or reject funding and retain its Eleventh Amendment immunity to such suits." Pet. App. 37a (emphasis added).[2]

3. On reheraring en banc, the Eighth Circuit concluded, by a six-to-four margin, that section 504 did constitute a valid exercise of congressional power under the Spending Clause. The court concluded that section 504's funding condition was sufficiently germane, and not impermissibly coercive, because it applied only to those particular agencies that accepted federal funds. Pet. App. 6a. The court recognized that, under that logic, a state agency, in order to preserve its Eleventh Amendment defense to claims under the Rehabilitation Act, would have to forfeit *all* of its federal funding, regardless of the amount of money at issue or the source and purpose of the funding. Pet. App. 6a. And the court further recognized that, in this case, the amount of federal funds subject to this forfeiture is approximately $250 million per year. Pet. App. 5a. Nonetheless, the court concluded that petitioner could "avoid

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[2] The panel also held that petitioner had waived its Eleventh Amendment defense to claims under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400-1487, by accepting funds specifically provided under that statute. Unlike the purported Rehabilitation Act waiver, which is triggered by the acceptance of *any* federal funds for any purpose, the IDEA waiver is triggered only by acceptance of funds specifically provided under the IDEA.

the requirements of Section 504 simply by declining federal education funds." Pet. App. 5a. According to the court, "[t]he sacrifice of all federal education funds, approximately $250 million or 12 per cent of the annual state education budget . . . would be politically painful, but we cannot say that it compels Arkansas's [sic] choice." Pet. App. 5a.

The dissenting judges concluded that section 504's funding condition violated both the germaneness and the non-coerciveness requirements established by this Court in *South Dakota v. Dole*. With regard to coercion, the dissenters stressed that, in contrast to the spending condition at issue in that case, under which "South Dakota would lose only 5% of its federal money for highways if [it] declined to raise the minimum drinking age to twenty one," the spending condition at issue here "places at risk 100% of Arkansas' federal funding for education - some $250,000,000 a year at last report." Pet. App. 7a. With regard to germaneness, the dissenters stressed that "the condition (waiver of Eleventh Amendment immunity with respect to Rehabilitation Act claims) bears no direct relationship (indeed, not even a discernible relationship) to the purpose of most federal grants to the states for education." Pet. App. 10a. The dissenters again contrasted this case to *South Dakota v. Dole*, where "the condition imposed by Congress (raising the state's drinking age to twenty-one) was directly related to the federal interest in safe interstate travel." Pet. App. 8a-9a.

REASONS FOR GRANTING THE WRIT

At bottom, this case presents the question whether the Spending Clause of the Constitution has any meaningful and judicially enforceable limits. The court of appeals held that a state agency accepting *any* amount of federal funds for *any* reason can be compelled to forfeit an Eleventh Amendment defense specifically provided to the states by the Constitution, and not otherwise subject to congressional abrogation. The decision below thus eviscerates the critical Spending Clause

requirements of germaneness and non-coercion recognized by this Court in *South Dakota v. Dole*. Moreover, in so doing, it provides Congress with a blueprint for overriding, through the use of coercive and non-germane funding conditions, the entire body of this Court's recent decisions repeatedly confirming, both inside and outside the context of Eleventh Amendment abrogation, that the federal government is one of limited and enumerated powers. For these reasons, prompt review by this Court is essential.

I. THE DECISION BELOW EVISCERATES SPENDING CLAUSE LIMITATIONS IMPOSED BY THIS COURT IN *SOUTH DAKOTA V. DOLE*

In *South Dakota v. Dole*, this Court held that Congress's power under the Spending Clause to "attach conditions on the receipt of federal funds", although broad, is not unlimited 483 U.S. 203, 206 (1987). Of the several limitations sketched in that case, two are particularly relevant here.

First, the Court made clear that "conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'" *Id.* at 207 (citation omitted). This "germaneness" requirement has deep legal roots and profound legal importance. It was applied in *United States v. Butler*, 297 U.S. 1 (1936), to strike down an untailored spending condition imposed under the Agricultural Adjustment Act. *See id.* at 73 ("There is an obvious difference between a statute stating the conditions upon which moneys shall be expended and one effective only upon assumption of a contractual obligation to submit to a regulation which otherwise could not be enforced."). Even outside the Spending Clause context, it is routinely applied to distinguish legitimate government bargains from "'out-and-out plan[s] of extortion.'" *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987) (citation omitted); *see generally* Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1456-76 (1989); Epstein, *The Supreme Court, 1987*

Term Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent, 102 Harv L. Rev. 4 (1988). And it serves an essential role in limiting federal power. As the Court explained in *New York v. United States*, 505 U.S. 144, 167 (1992), "conditions must . . . bear some relationship to the purpose of federal spending . . . otherwise, of course, the spending power could render academic the Constitution's other grants and limits of federal authority."

Second, the *South Dakota v. Dole* Court made clear that a funding condition, to be constitutional, must not be coercive. As the Court explained, "[o]ur decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" 483 U.S. at 211 (citation omitted). That principle is critical because, just as "the power to tax involved the power to destroy," *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 430 (1819), so too "[t]he power to confer or withhold unlimited benefits is the power to coerce or destroy," *Butler*, 297 U.S. at 71. The non-coercion principle has particular force in the context of putative waivers of constitutional rights, because all such waivers — including those of Eleventh Amendment defenses — must be knowing *and voluntary*. *See, e.g., College Sav. Bank v. Florida Prepaid Postsecondary Edu. Expense Bd.*, 527 U.S. 666, 675 (1999); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

The decision below eviscerates both of these crucial principles. In *South Dakota v. Dole*, this Court held that the germaneness requirement was satisfied only after concluding that the funding condition at issue (requiring states to raise their respective drinking ages to 21) was "directly related to one of the main purposes for which highway funds are expended — safe interstate travel." 483 U.S. at 208. By contrast, in the decision below, the court of appeals held that the germaneness requirement was satisfied even though section 504 itself provides *no* federal funds to assist the states in

educating handicapped children, and even though the vast bulk of federal funding of education serves entirely distinct purposes. Pet. App. 4a-6a.[3] In *South Dakota v. Dole*, this Court held that the non-coercion requirement was satisfied only after concluding that the conditioned funds were relatively small both in total amount ($4 to $8 million) and as an overall percentage of the specific federal spending program at issue (five percent). *See* 483 U.S. at 210; 791 F.2d 628, 630 (8th

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[3] To name only a few examples, petitioner receives federal funds under spending programs designed to increase participation of low-income students in advanced placement courses (*see* Higher Education Amendments of 1998, Title VIII, Part B, 20 U.S.C. § 1070a), to foster bilingual education (*see* Elementary and Secondary Education Act, Title VII, Part A, Subpart I, 20 U.S.C. § 7424), to encourage school attendance by homeless students (*see* McKinney Homeless Assistance Act of 1987, 42 U.S.C. § 11431-11435), to provide for professional development of teachers (*see* Elementary and Secondary Education Act, Title II, Part A, 20 U.S.C. §§ 6621-6623), to assist schools with large immigrant populations (*see* Elementary and Secondary Education Act, Title VII, Part C, 20 U.S.C. § 7541-7549), to address the special needs of migrant children (*see* Elementary and Secondary Education Act, Title I, Part C, 20 U.S.C. §§ 6391-6399), to provide special programs for neglected or delinquent children (*see* Elementary and Secondary Education Act, Title I, Part D, 20 U.S.C. §§ 6421-6472), and to combat drugs and violence in schools (*see* Elementary and Secondary Education Act Title IV, Part A, 20 U.S.C. §§ 7111-7117). None of these programs is even remotely related to assisting or preventing discrimination against the handicapped, the objective of section 504 of the Rehabilitation Act. Yet under the decision below, if petitioner accepts even a dime from any of these programs, it can permissibly be compelled to waive its Eleventh Amendment immunity from all claims under section 504.

Cir. 1986). By contrast, in the decision below, the court of appeals held that the non-coercion requirement was satisfied even though the funding condition encompassed *all* federal funds made available to petitioners, and even though the total amount of conditioned funds was some 40 times greater. Pet. App. 5a-6a. Indeed, the *only* limiting principle recognized by the court of appeals was that the federal government, in purporting to extract an Eleventh Amendment waiver from any state agency accepting any amount of federal funds for any purposes, did not additionally seek to extend the waiver to the entire State. Pet. App. 4a. If that requirement alone were sufficient to uphold the constitutionality of a funding condition, then the requirements of germaneness and non-coercion would be a dead letter, and the spending power would be virtually unlimited.

For that reason, this case presents an ideal vehicle for confirming that the Spending Clause has meaningful and judicially enforceable limits, much as *United States v. Lopez*, 514 U.S. 549 (1995), presented an ideal vehicle for confirming that the Commerce Clause similarly has meaningful and judicially enforceable limits. In *Lopez*, despite decades of modern precedents emphasizing the broad scope of the commerce power, this Court invalidated the Gun Free School Zones Act of 1990 as beyond the scope of that power. The Court concluded that the critical vice of that statute was that, under the theories urged in its defense, "it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate." *Id.* at 564. Similarly here, because the Court has not actually invalidated a spending condition since *Butler*, one commentator has suggested that courts pay only "lip service" to the stated limits on the Spending Clause, Sullivan, 102 Harv. L. Rev. at 1432, while several judges have stated that such

limits exist only "if the Court meant what it said in *Dole*," *Virginia Dep't of Edu. v. Riley*, 106 F.3d 559, 570 (4th Cir. 1997) (en banc) (six-judge plurality). Because the court of appeals paid *South Dakota v. Dole* only lip service in this case, and adopted reasoning that would make the Spending Clause virtually unlimited, this case cries out for the Court to define with greater precision the outer bounds of congressional power under the Spending Clause or, at a minimum, to confirm that the power is not unbounded.

II. A BROAD CONGRESSIONAL POWER TO IMPOSE NON-GERMANE AND COERCIVE SPENDING CONDITIONS WOULD SUBVERT FUNDAMENTAL PRINCIPLES OF FEDERALISM

By upholding the imposition of obviously non-germane and coercive funding conditions on any state agency that accepts any amount of federal dollars for any purpose, the court of appeals subverted not only the particular Spending Clause limitations imposed by this Court in *South Dakota v. Dole*, but also much broader principles of federalism repeatedly embraced by this Court over the past decade.

To begin with, the court of appeals' decision makes a mockery of this Court's recent Eleventh Amendment abrogation decisions. Within the last five years alone, the Court has held that Congress lacks power under Article I to abrogate any Eleventh Amendment immunities, *see Seminole Tribe v. Florida*, 517 U.S. 44 (1996); that Congress lacks power under Section 5 of the Fourteenth Amendment to abrogate Eleventh Amendment immunities against claims of illegal discrimination against the disabled, *see Board of Trustees of the Univ. of Alabama v. Garrett*, 121 S. Ct. 955 (2001); and that Congress lacks power to impose "constructive" Eleventh Amendment waivers that lack the traditional waiver requirements of knowledge and free choice, *see College Savings*, 527 U.S. at 675. These and related

decisions confirm that state immunity "is a fundamental aspect of the sovereignty" of the States, *Alden v. Maine*, 527 U.S. 706, 713 (1999); indeed, "[t]he Constitution never would have been ratified if the States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself," *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 240 n.2 (1985). All of these holdings and principles would be meaningless if, as permitted under the court of appeals' decision, the Congress could secure a *de facto* abrogation by imposing on all state agencies a Hobson's choice between forfeiture of an Eleventh Amendment defense and forfeiture of every last nickel of federal funding, no matter how unrelated to the federal interest asserted in defense of the putative waiver.

Nor could the Eleventh Amendment damage be confined to claims under the Rehabilitation Act. A wide range of Spending Clause statutes, including section 504 of the Rehabilitation Act, Title IX of the Education Amendments of 1972, and Title VI of the Civil Rights Act of 1964, incorporate the same attempted abrogation provision, *see* 42 U.S.C. § 2000d-7(a), and the same agency-wide definition of the state "program or activity" subject to spending conditions, *see* Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28, 28-31. Under the decision below, a state agency accepting any federal funds for any purpose could be compelled to waive its Eleventh Amendment defenses to claims under all of these Spending Clause statutes. Indeed, if the decision below is upheld, congressional use of spending conditions to subvert this Court's recent anti-abrogation decisions can only be expected to accelerate.

The court of appeals' decision has similarly drastic federalism ramifications outside the specific context of Eleventh Amendment abrogation. For example, in recent years, this Court has held that Congress itself lacks the power to prohibit possession of weapons near schools, *see Lopez*, 514

U.S. 549, and to provide private rights of action for victims of gender-motivated domestic violence, *United States v. Morrison*, 529 U.S. 528 (2000); that Congress cannot compel the States to make affirmative accommodations for religious practices, *see City of Boerne*, 521 U.S. 507; and that Congress cannot compel the States to implement even otherwise permissible federal regulatory programs, *see Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144. But under the court of appeals' decision, Congress could compel the States to do all of these things — and more — by subjecting all of their agencies to non-germane and coercive funding conditions. As this Court itself has recognized, absent meaningful requirements of germaneness and non-coercion, the Spending Power would swallow up, and thus "render academic the Constitution's other grants and limits of federal authority." *New York*, 505 U.S. at 167.

Yet other federalism principles would fall by the wayside. Even express constitutional limitations on federal power could be subverted such as, including the Eleventh Amendment limitations directly at issue here and the Tenth Amendment limitations at issue in *Printz* and *New York*. Moreover, no area of state authority would be safe from federal control through coercive and non-germane spending conditions. Indeed, this case on its facts involves federal regulation of education, which is "perhaps the most important function of state and local governments," *Honig v. Doe*, 484 U.S. 305, 309 (1988) (citation omitted), and an area "where States have historically been sovereign," *Lopez*, 514 U.S. at 564. Given the existing framework of extensive federal taxing and spending, the States have no viable alternative but to accept at least some federal funding. The practical necessity of some federal funding of education, however, should not permit Congress to regulate this core state function by indirection, through the imposition of coercive and non-germane funding conditions.

The Fourth Circuit's recent en banc decision in *Riley*,

confirms the importance of the question presented in this case. In that case, an eleven-judge majority held that the Individuals With Disabilities Education Act ("IDEA") does not compel states accepting IDEA funds to provide free education to students expelled from school for misconduct unrelated to any disability. *See* 106 F.3d at 560-61. Speaking through Judge Luttig, a six-judge plurality further concluded that any such funding condition would violate the Spending Clause and the Tenth Amendment. *See id.* at 569 The plurality stressed that the germaneness and non-coercion requirements were not satisfied in that case because the putative spending condition would have extended to the entire $60 million IDEA grant, as opposed to the relatively small percentage of IDEA funds provided to educate the expelled children specifically at issue. *See id.* at 569. The plurality warned about the grave dangers to federalism if the Spending Clause were unduly expanded "in a time when the several States have become increasingly dependent upon the Federal Government for funds, because the Federal Government has increasingly become dependent upon the revenues from taxation it receives from the citizens of the several States." *Id.* at 570. This case exemplifies those concerns.

* * * *

The four dissenting judges below correctly concluded that if the Spending Clause were construed "to permit Congress to seek otherwise forbidden regulatory aims indirectly through a conditional offer of federal funds to the states, the notion of 'a federal government of enumerated powers' [would] have no meaning." Pet. App. 9a. In adopting that vision of the Spending Clause, the decision below eviscerates the Spending Clause principles recognized by this Court in *South Dakota v. Dole*, the sovereign immunity principles recognized by this Court in cases such as *Seminole Tribe*, *Garrett* and *College Savings*, and, even more broadly, the federalism principles vigorously enforced by this Court for over a decade.

Immediate review is therefore essential.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-1830EA

Jim C, individually and as parent and next friend of J.C., and Susan C, individually and as parent and next friend of J.C.,	*	
Appellees,	*	
v.	*	
United States of America,	*	On Appeal from the United States District Court for the Eastern District of Arkansas.
Intervenor on Appeal,	*	
Atkins School District, and Arch Ford Education Service Cooperative,	*	
Defendants,	*	
Arkansas Department of Education,	*	
Appellant.	*	

Submitted: January 14, 2000
Filed: December 22, 2000

Before WOLLMAN, Chief Judge, McMILLIAN, RICHARD S. ARNOLD, BOWMAN, BEAM, LOKEN, HANSEN, MORRIS SHEPPARD ARNOLD, MURPHY, and BYE, Circuit Judges.

RICHARD S. ARNOLD, Circuit Judge, joined by WOLLMAN, Chief Judge, and McMILLIAN, HANSEN, MORRIS SHEPPARD ARNOLD, and MURPHY, Circuit Judges.

Plaintiffs, parents of a child with autism, brought this suit against the defendant, the Arkansas Department of Education. They alleged that the defendant had failed to comply with its obligations under certain statutes, including Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. The defendant moved to dismiss the suit, asserting sovereign immunity, as recognized by the Eleventh Amendment. The District Court[1] denied the motion, holding that the abrogation provision of Section 504, 42 U.S.C. § 2000d-7(a)(1), was a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment. On appeal, a panel of this Court reversed, holding that Section 504 could not be upheld as Section 5 legislation. Bradley v. Arkansas Department of Education, 189 F.3d 745, 756 (8th Cir. 1999). The panel then considered whether Arkansas had waived its sovereign immunity with respect to Section 504 by accepting federal funds. The panel held that there was no waiver, concluding that Section 504 was not a valid exercise of Congress's spending power because the conditions it placed on a State's receipt of federal funds were too broad and therefore coercive. Id. at 758. We granted plaintiffs' suggestion for rehearing en banc on the spending-

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[1] The Hon. Garnett Thomas Eisele, United States District Judge for the Eastern District of Arkansas.

power issue alone, vacating that portion of the panel's opinion and judgment. We hold that Section 504 is a valid exercise of Congress's spending power, and that Arkansas waived its immunity with respect to Section 504 suits by accepting federal funds. The judgment of the District Court, denying the State's motion to dismiss, will therefore be affirmed.

Section 504 of the Rehabilitation Act prohibits "any program or activity" that receives federal financial assistance from discriminating against a qualified individual with a disability. 29 U.S.C. § 794(a). The statute, in relevant part, defines "program or activity" as:

> all of the operations of --
>
> (1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or
>
> (B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;
>
> . . . .
>
> any part of which is extended Federal financial assistance.

29 U.S.C. § 794(b). Under this definition, the State itself as a whole is not a program or activity. Rather, as we have previously noted, "only the department or agency which receives [or distributes] the aid is covered." Klinger v. Dep't of Corrections, 107 F.3d 609, 615 (8th Cir. 1997) (quoting S. Rep. No. 100-64, 100th Cong., 2d Sess. 4 (1988), reprinted in 1988 U.S.C.C.A.N. (Legislative History) 3, 6.[2] The

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[2] Klinger dealt with Title IX's definition of "program or activity," 20 U.S.C. § 1687, which is identical to the definition in Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(b). Both Title IX and Section 504

acceptance of funds by one state agency therefore leaves unaffected both other state agencies and the State as a whole.[3]

The Rehabilitation Act requires States that accept federal funds to waive their Eleventh Amendment immunity to suits brought in federal court for violations of Section 504. 42 U.S.C. § 2000d-7. Since Section 504 covers only the individual agency or department that accepts or distributes federal funds, this waiver requirement is limited in the same way. By accepting funds offered to an agency, the State waives its immunity only with regard to the individual agency that receives them. A State and its instrumentalities can avoid Section 504's waiver requirement on a piecemeal basis, by simply accepting federal funds for some departments and declining them for others. The State is accordingly not required to renounce all federal funding to shield chosen state agencies from compliance with Section 504.

The defendant argues that Section 504's waiver requirement exceeds Congress's spending power by placing overly broad and therefore coercive conditions on federal funds. We disagree. Congress is empowered to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. Const. art. I, § 8, cl. 1. "Incident to this power, Congress may attach conditions on the receipt of federal

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were amended by the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988), to add this definition of "program or activity."

[3] If the entire state government were subject to Section 504 whenever any of its parts received federal funds, then subsection (b)(1)(B) would be superfluous; both the distributing and receiving state entities would be already covered under (b)(1)(A) whenever either received federal funds. Other circuits interpreting this definition of "program or activity" have come to the same conclusion. Lightbourn v. County of El Paso, Texas, 118 F.3d 421, 427 (5th Cir. 1997); Schroeder v. City of Chicago, 927 F.2d 957, 962 (7th Cir. 1991).

funds . . .." South Dakota v. Dole, 483 U.S. 203, 206 (1987). Specifically, Congress may require a waiver of state sovereign immunity as a condition for receiving federal funds, even though Congress could not order the waiver directly. College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 119 S. Ct. 2219, 2231 (1999). While it appears, as the defendant urges, that the "financial inducements" employed by Congress can become so "coercive as to cross the point where 'pressure turns into compulsion,'" that limit has not been crossed here. Id. (citations omitted).

To avoid the effect of Section 504 on the Arkansas Department of Education, the State would be required to sacrifice federal funds only for that department. This requirement is comparable to the ordinary quid pro quo that the Supreme Court has repeatedly approved; the State is offered federal funds for some activities, but, in return, it is required to meet certain federal requirements in carrying out those activities. See, e.g., Lau v. Nichols, 414 U.S. 563, 566-67 (1974) (upholding Congress's power to condition federal education funds on non-discrimination in the funded programs). In these cases, the Court has found no coercive interference with state sovereignty because the State could follow the "'simple expedient' of not yielding. . .." State of Oklahoma v. United States Civil Service Commission, 330 U.S. 127, 143-44 (1947). Likewise here, the Arkansas Department of Education can avoid the requirements of Section 504 simply by declining federal education funds. The sacrifice of all federal education funds, approximately $250 million or 12 per cent. of the annual state education budget according to the 1999-2001 Biennial Budget, 28-29, would be politically painful, but we cannot say that it compels Arkansas's choice. Cf. New York v. United States, 505 U.S. 144, 168 (1992) ("By [employing the spending power to attach conditions on the States' receipt of federal funding], as by any other permissible method of encouraging a State to conform to federal policy choices, the residents of the State retain the

ultimate decision as to whether or not the State will comply. If a State's citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant.") The choice is up to the State: either give up federal aid to education, or agree that the Department of Education can be sued under Section 504. We think the Spending Clause allows Congress to present States with this sort of choice.

With regard to the requirements of Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 247 (1985), the Rehabilitation Act's waiver provision, 42 U.S.C. § 2000d-7(a)(1), provides a clear expression of Congress's "intent to condition participation in the program[] . . . on a State's consent to waive its constitutional immunity." See Lane v. Pena, 116 S. Ct. 2092, 2100 (1996); Little Rock School District v. Mauney, 183 F.3d 816, 831 (8th Cir. 1999). We hold, therefore, that Arkansas waived sovereign immunity, with respect to suits under Section 504 against the Department of Education, when it chose to participate in the federal spending program created by that Section.

The panel opinion took the position that the waiver required would cover all activities of the State, not just the activities of the department or departments receiving federal funds. As a matter of statutory interpretation, we disagree: for reasons we have given, Section 504's definition of "program or activity" is not that broad. We acknowledge that the waiver does cover all activities of the Department of Education, and not merely those activities specifically supported by Section 504 funds. We do not consider such a choice unconstitutionally "coercive." The State may take the money or leave it. Other than the vacated panel opinion in this case, we know of no authority holding any choice so coercive as to exceed the limits of the Spending Clause. Sovereign states are fully competent to make their own choice.

The judgment is affirmed.

BOWMAN, Circuit Judge, dissenting, joined by BEAM, LOKEN, and BYE, Circuit Judges.

I respectfully disagree with the Court's decision. I do so for two separate, independent reasons, either of which, in my view, requires reversal of the District Court. I state them briefly.

First, the financial inducement offered by Congress for the Arkansas Department of Education to waive its Eleventh Amendment immunity with respect to Rehabilitation Act claims is coercive. The Supreme Court explicitly has recognized that financial pressure applied by Congress may "pass the point at which 'pressure turns into compulsion.'" South Dakota v. Dole, 483 U.S. 203, 211 (1987) (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)). In Dole, the Court rejected the argument as to coercion on the ground that South Dakota would lose only 5% of its federal money for highways if South Dakota declined to raise the minimum drinking age to twenty-one as Congress wished. Inasmuch as the condition imposed by Congress placed only a small percentage of the state's federal money for highways at risk, "the argument as to coercion is shown to be more rhetoric than fact." Id.

In contrast, here we confront a Congressional directive that places at risk 100% of Arkansas's federal funding for education—some $250,000,000 a year at last report. This amount of money to support public education could not easily be replaced by Arkansas, and public education undoubtedly would suffer if Arkansas failed to yield the requested waiver of its Eleventh Amendment immunity. The money would have to be shifted from other needy portions of Arkansas's budget or raised by the imposition of additional taxes. Either course assuredly would present great difficulty. And either way, federal taxpayers in Arkansas would be deprived of the benefits of a return from the federal government to the state of a significant amount of the federal tax monies collected from Arkansas. Moreover, we should not be unmindful of how unpopular and potentially counter-productive it is to increase

state taxes when federal taxes (especially when taken in combination with existing state and local taxes) are at a very high level, as they currently are and have been for many years.[1] In sum, the proportion of federal funds for education in Arkansas here placed at risk by the federal scheme (100%), the amount of those funds (some $250,000,000), and the difficulty of making up for the loss of those funds if the State elects not to waive its Eleventh Amendment immunity with respect to Rehabilitation Act claims all lead to the conclusion that pressure has turned into compulsion and that the waiver given by the State is therefore unenforceable.

Second, as our Court held in a portion of the panel opinion not affected by the en banc proceedings in this case, § 504 of the Rehabilitation Act and its related abrogation clause do not abrogate the states' Eleventh Amendment immunity. That is so because the Rehabilitation Act imposes duties upon the states exceeding those commanded by the Fourteenth Amendment, and thus is beyond the power over the states given to Congress by § 5 of that amendment. For the panel's complete analysis of this point, see Bradley v. Arkansas Department of Education, 189 F.3d 745, 754-56 (8th Cir. 1999). The question then becomes whether Congress, in the guise of Spending Clause legislation, can achieve indirectly what it cannot constitutionally achieve directly. That is, can Congress get its way by presenting the states with the Hobson's choice of either waiving their Eleventh Amendment immunity from § 504 claims or foregoing all federal funds to support various traditional state activities such as education, highways, and the like? Professor Lynn A. Baker has brilliantly captured the essence of this question:

> So long as [Article I, which enumerates all the powers granted to Congress by the original Constitution] is not

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[1] For a scholarly explication of this point, see Lynn A. Baker, Conditional Federal Spending After Lopez, 95 Colum. L. Rev. 1911, 1935-39 (1995).

> interpreted to grant Congress plenary power to regulate the states directly, the Tenth Amendment's reservation to the states of all powers not delegated to the federal government has content and significance. But if the Spending Clause is simultaneously interpreted to permit Congress to seek otherwise forbidden regulatory aims indirectly through a conditional offer of federal funds to the states, the notion of "a federal government of enumerated powers" will have no meaning.

Lynn A. Baker, Conditional Federal Spending After Lopez, 95 Colum. L. Rev. 1911, 1920 (1995) (footnote omitted). As Professor Baker noted, Justice O'Connor has sounded the same theme:

> If the spending power is to be limited only by Congress' notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives "power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed." This, of course, . . . was not the Framers' plan and it is not the meaning of the Spending Clause.

Dole, 483 U.S. at 217 (O'Connor, J., dissenting) (citation omitted) (quoting United States v. Butler, 297 U.S. 1, 78 (1936)).

For the majority of the Court in Dole, the proper way to limit the Spending Clause (besides applying the coercion test) is to require, among other things, that any conditions placed on federal grants to the states be related "to the federal interest in particular national projects or programs." Id. at 207 (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978) (plurality opinion)). The Court found that this test was satisfied in Dole inasmuch as the condition imposed by Congress (raising the state's drinking age to twenty-one) was

directly related to the federal interest in safe interstate travel, which the Court found to be "one of the main purposes for which [federal] highway funds are expended."[2] Id. at 208.

The kind of finding made in Dole could not plausibly be made in this case. Here, the condition (waiver of Eleventh Amendment immunity with respect to Rehabilitation Act claims) bears no direct relationship (indeed, not even a discernible relationship) to the purpose of most federal grants to the states for education. That purpose, broadly stated, is to improve the overall quality of education. Admittedly, fair, nondiscriminatory treatment for disabled persons is part of the total picture, but it is only a small part. Although it presumably would be permissible for Congress to condition the receipt of any grants it might make specifically for Rehabilitation Act purposes upon a wavier of state immunity from § 504 claims—a normal quid pro quo—it is not permissible to condition the receipt of other, unrelated federal grants for education upon such a waiver. Conditions on the receipt of federal funds always must "bear some relationship to the purpose of the federal spending; otherwise, of course, the spending power could render academic the Constitution's other grants and limits of federal authority." New York v. United States, 505 U.S. 144, 167 (1992) (citation omitted). Thus, because the condition imposed in this case is overbroad, going as it does to all federal funds received by the Arkansas Department of Education, no matter what the particular purpose of the funds, the State's waiver of its Eleventh Amendment immunity has not been validly exacted.

For either or both of the reasons outlined above, I would hold that plaintiffs' § 504 claim against the Arkansas Department of Education should be dismissed as barred by the

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[2] Justice O'Connor would have found the condition "not sufficiently related to interstate highway construction" and therefore would have held the condition invalid. Dole, 483 U.S. at 214; see id. at 218.

Eleventh Amendment. Accordingly, I would reverse the decision of the District Court allowing the suit to go forward on this claim.

Over the past several years, the Supreme Court in a series of cases has rigorously applied the constitutional prohibition against Congress's use of its Article I powers as a basis for abrogating the Eleventh Amendment immunity of the states. See Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (holding that Age Discrimination in Employment Act did not validly abrogate states' eleventh Amendment immunity from individual suits because abrogation exceeded Congress's authority under § 5 of Fourteenth Amendment, and reiterating that no such authority exists under Article I); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) (holding that congressional attempt to abrogate states' sovereign immunity from patent infringement claims under Patent and Plant Variety Protection Remedy Clarification Act was invalid exercise of Article I commerce or patent powers and not justified under Fourteenth Amendment § 5 enforcement powers); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) (holding that Congress did not abrogate states' Eleventh Amendment immunity from suit under Trademark Remedy Clarification Act because Act identified no property right protected by Fourteenth Amendment, whose § 5 enforcement powers were only possible basis for purported abrogation); Seminole Tribe v. Florida, 517 U.S. 44 (1996) (holding, in seminal case, that Indian Gaming Regulatory Act could not abrogate states' sovereign immunity as exercise of Congress's power under Indian Commerce Clause because Article I powers could not circumvent Eleventh Amendment restrictions on Article III judicial power).

The Court's holdings in these cases reflect the rock-solid principle that Eleventh Amendment immunity trumps any

exercise of the powers of Congress enumerated in the original Constitution; controlling weight must be given to the provision that became part of the Constitution later in time. I am struck, however, by how easy it would be, if the majority of our Court has decided this case correctly, for Congress to overcome this limitation on its power. By resort to the spending power (another Article I power, by the way), Congress could achieve indirectly the same abrogation of Eleventh Amendment immunity it could not achieve directly. Congress could do this by the simple expedient of coupling an abrogation provision with a provision conditioning the states' receipt of any or all federal funds upon the states' waiver of Eleventh Amendment immunity with respect to whatever sorts of claims Congress might specify. Given the financial and political reality within which state governments struggle to fund their operations adequately, most if not all of the states would yield. The same scenario could unfold with respect to other kinds of conditions on the states' receipt of federal funds, with Congress achieving through the spending power ends it otherwise lacks the constitutional authority to pursue. Truly, the view of the Spending Clause taken by the majority of the Court in today's decision gives "power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed." Butler, 297 U.S. at 78. It seems quite clear to me that the Framers never intended the Spending Clause to become an enabling provision for the otherwise unconstitutional exercise of federal power over the states. Yet this is precisely what today's decision ordains. If our Court will not take a hard look at the anomaly created by a "spending power über alles" mentality, perhaps the Supreme Court will.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-1830EALR	*	
	*	
Jim C., et al.,	*	
Appellees,	*	Appeal from the United
	*	States District Court for
v.	*	the Eastern District of
Arkansas Department of Education,	*	Arkansas
	*	
	*	
Appellant.	*	

The petition for rehearing en banc filed by appellees Jim C., et al., is granted in part. The issue subject to rehearing is limited to the spending clause issue. The case will be heard for oral argument on Friday, January 14, 2000. Counsel for appellees and counsel for the United States may share the twenty (20) minute argument time allotted per side.

Counsel for appellees should immediately forward 21 copies of their previously-filed briefs and appendices for distribution to the court en banc.

December 21, 1999

Order Entered at the Direction of the Court:

/s/ Michael E. Gaus

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-1830EALR	*	
	*	
Jim C., et al.,	*	
Appellees,	*	Appeal from the United
	*	States District Court for
v.	*	the Eastern District of
	*	
Arkansas Department of Education,	*	Arkansas
	*	
	*	
Appellant.	*	

ORDER

The petition of the United States of America for rehearing en banc is granted. This grant of rehearing en banc is limited to the spending clause issue raised by the petition. Those portions of the court's August 31, 1999, opinion and judgment covering the spending clause issue are vacated. The remainder of the court's opinion and judgment, including that portion of the opinion and judgment in case No. 98-1010, is unaffected by this order.

The clerk is directed to set this case on the court en banc's calendar for oral argument on Friday, January 14, 2000. The case will be assigned twenty (20) minutes per side.

Counsel should immediately forward twenty-one (21) copies of their previously-filed briefs and appendices for distribution to the court en banc.

December 14, 1999

Order Entered at the Direction of the Court:

/s/ Michael E. Gaus

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-1010

Thomas Bradley, as Natural Guardian of, and on behalf of David Bradley, a minor; Dianna Bradley, as Natural Guardian of, and on behalf of David Bradley, a minor;	*	
Plaintiffs-Appellees,	*	
United States of America,	*	
Intervenor on Appeal,	*	Appeals from the United States District Court for the Eastern District of Arkansas.
v.	*	
Arkansas Department of Education; Mike Crowley, individually and in his capacity as an employee of the Arkansas Department of Education;	*	
Defendants-Appellants,	*	
Williford School District 39; John Does, 1-10,	*	
Defendants,	*	
Advocacy Services, Inc.,	*	
Amicus Curiae.	*	

No. 98-1830

Jim C, individually and as parent and next friend of J.C.; Susan C, individually and as parent and next friend of J.C.; Plaintiffs-Appellees,	*
United States of America, Intervenor on Appeal,	*
v.	*
Atkins School District; Arch Ford Education Service Cooperative; Defendants,	*
Arkansas Department of Education, Defendant-Appellant.	*

Submitted: September 24, 1998
Filed: August 31, 1999

Before BOWMAN, Chief Judge,[1] LOKEN, and KELLY,[2] Circuit Judges.

BOWMAN, Chief Judge.

In these two cases, consolidated on appeal, Arkansas residents brought suit against the Arkansas Department of Education (ADE) and other defendants, alleging violations of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. §§ 1400-1487 (West Supp. 1999); § 504 of the Rehabilitation Act (RA), 29 U.S.C. § 794 (1994); and other provisions of state and federal law. The State of Arkansas, representing the ADE and Mike Crowley, a Bradley defendant and ADE employee, moved the District court in each case to dismiss the actions, claiming the Eleventh Amendment prevented a federal court from exercising jurisdiction over such claims. The District Court denied Arkansas's motions with respect to the IDEA and, in Jim C., § 504 of the RA. The state then filed these interlocutory appeals.

I.

These interlocutory appeals involve exclusively legal issues, so we provide only a brief summary of the facts of each case. In Bradley, Thomas and Dianna Bradley filed suit against the ADE, ADE employee Mike Crowley, the local school district, and other unidentified individual defendants, alleging violations of the IDEA and other state and federal statutes. The

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[1] The Honorable Pasco M. Bowman stepped down as Chief Judge of the United States Court of Appeals for the Eighth Circuit at the end of the day on April 23, 1999. He has been succeeded by the Honorable Roger L. Wollman.

[2] The Honorable John D. Kelly died on October 21, 1998. The case has been decided by the remaining members of the panel pursuant to 28 U.S.C. § 46(d) (1994) and 8th Cir. R. 47E.

Bradleys' IDEA claim asserts that the ADE, Crowley, and the local school district failed to provide an adequate due process hearing under the IDEA to review their son David's Individual Education Program (IEP).[3]

Representing the ADE and Crowley, Arkansas moved for dismissal or in the alternative for summary judgment on a number of grounds. One argument Arkansas raised is that the Eleventh Amendment bars a federal court from exercising jurisdiction over the Bradleys' IDEA claim.

The Honorable James M. Moody, United States District Judge for the Eastern District of Arkansas, denied the state's motion. Judge Moody concluded that the IDEA was a valid exercise of Congress's power under § 5 of the Fourteenth Amendment to enforce the Equal Protection Clause, and that the IDEA's provisions abrogating the state's Eleventh Amendment immunity therefore were valid under Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996). See Bradley v. Arkansas Dep't of Educ., No. LR-C-96-1004, slip op. at 4 (E.D. Ark. Nov. 21, 1997) (order denying motion to dismiss or for summary judgment). Arkansas appealed the denial of its motion to dismiss the Bradleys' IDEA claim on Eleventh Amendment grounds, and Judge Moody stayed proceedings pending this appeal.

In Jim C., Jim and Susan C. filed suit against the ADE, Arch Ford Education Services Cooperative, and the local school district, alleging violations of the IDEA, § 504 of the RA, 42 U.S.C. § 1983 (1994), and state law. In particular, Jim and Susan C. claimed that their child, J.C., should receive additional treatment consistent with the Lovaas program, a

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[3] An IEP is a written statement that indicates the educational performance level of a child with a disability and the special and mainstream services that will be used to accommodate the child and ensure that the child receives an appropriate education. See 20 U.S.C.A. §§ 1401(11), 1414(d) (West Supp. 1999).

methodology found to have some success in treating children with autism. See Jim C. v. Atkins Sch. Dist., No. LR-C-96-748, slip op. at 2 (E.D. Ark. Feb. 23, 1998) (memorandum opinion and order). Representing the ADE, Arkansas moved for dismissal or in the alternative for summary judgment, asserting in part that the Eleventh Amendment prevented a federal court from exercising jurisdiction over Jim and Susan C.'s IDEA, § 504 and § 1983 claims.

The Honorable G. Thomas Eisele, United States District Judge for the Eastern District of Arkansas, denied Arkansas's motion to dismiss Jim and Susan C.'s IDEA and § 504 claims. Judge Eisele agreed with Judge Moody's order in Bradley that the abrogation provision in the IDEA was a valid exercise of Congress's § 5 power. See id. at 5-6 (quoting Bradley, LR-C-96-1004, slip op. at 4). Judge Eisele also determined § 504 was a valid exercise of Congress's § 5 power. See id. at 7.[4] Therefore, the District court concluded it had jurisdiction over the IDEA and § 504 claims. Arkansas appealed, and the District Court held in abeyance its ruling on further motions and granted a continuance while the appeal was pending. See id. Arkansas then requested that Jim C. be consolidated with Bradley.

II.

The text of the Eleventh Amendment reads: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. The Amendment's text, however, does not accurately

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[4] Judge Eisele concluded that the Eleventh Amendment prevents the District Court from exercising jurisdiction over the § 1983 claim Jim and Susan C. brought against the ADE, and therefore dismissed that claim. See Jim C., LR-C-96-748, slip op. at 7. This ruling has not been appealed.

define the bounds of the immunity that the Amendment reflects. See Alden v. Maine, 119 S. Ct. 2240, 2246 (1999) (stating that "Eleventh Amendment immunity," while a convenient shorthand, is "something of a misnomer, for the sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment"). Rather, Eleventh Amendment immunity generally prevents an unwilling state from being sued in federal court. See Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 119 S.Ct. 2199, 2204 (1999) [hereinafter Florida Prepaid]; Seminole Tribe, 517 U.S. at 54; see also Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 267 (1997) (saying the Eleventh Amendment "enacts a sovereign immunity from suit, rather than a nonwaivable limit on the Federal Judiciary's subject-matter jurisdiction"). The Amendment's protections also may reach to state officials and state agencies, see Hadley v. North Ark. Community Technical College, 76 F.3d 1437, 1438 (8th Cir. 1996) (quoting Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 123 n.34 (1984)), cert. denied 519 U.S. 1148 (1997), and to suits brought against a state by citizens of that same state, see Hans v. Louisiana, 134 U.S. 1, 15 (1890); see also Coeur d'Alene, 521 U.S. at 268 (reaffirming Hans). Therefore, the Eleventh Amendment may prevent the plaintiffs in these consolidated cases, all citizens of Arkansas, from proceeding in federal court against the ADE, an Arkansas state agency, and defendant Crowley, an ADE official, for alleged violations of the IDEA and § 504.

Although agreeing that the Eleventh Amendment analysis is appropriate, the plaintiffs and intervenor the United States argue that three exceptions to Arkansas's Eleventh Amendment immunity allow the plaintiffs to proceed with their claims in federal court. First, the plaintiffs assert that Congress, exercising the power granted it by § 5 of the Fourteenth Amendment, abrogated the states' immunity and forced unwilling states to defend themselves in federal court against claims brought for violating the IDEA and § 504.

Second, they argue that Arkansas waived its Eleventh Amendment immunity because it received federal funds appropriated with the conditions imposed by the IDEA and § 504, and that one of the conditions imposed was that a state consent to defend itself in federal court against claims arising under those statutes. Finally, the Bradleys contend that, even if Arkansas is shielded by its Eleventh Amendment immunity, defendant Crowley nevertheless may be enjoined from engaging in future conduct that is contrary to federal law.

III.

Turning first to the plaintiffs' arguments that federal courts have jurisdiction over IDEA claims brought against the ADE and, in Bradley, defendant Crowley, we note that this Court recently has considered whether a state may be sued in federal court for alleged violations of the IDEA. In that decision, Little Rock School District v. Mauney, No. 98-1721, 1999 WL407763 (8th Cir. Jun. 14, 1999), we allowed private citizens' claims that the ADE had violated the IDEA to proceed in federal court on two independent grounds, either of which was a sufficient basis for rejecting the ADE's claim of Eleventh Amendment immunity: (1) that the IDEA abrogated the states' immunity and that the abrogation was effective because Congress exercised its power under § 5 of the Fourteenth Amendment when enacting the IDEA; and (2) that Congress created a valid spending program when it enacted the IDEA, and that Arkansas waived its immunity when it participated in IDEA programs, accepting funds appropriated pursuant to the IDEA and governed by the conditions imposed by the IDEA. See id. at *11-*12.

After our opinion in Mauney was filed, however, the Supreme Court announced a trilogy of Eleventh Amendment cases, Alden, Florida Prepaid, and College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 119 S.Ct. 2219 (1999) [hereinafter College Savings]. This Court then announced its en banc decision in Alsbrook v. City of

Maumelle, No. 97-1825, 1999 WL 521709 (8th Cir. Jul. 23, 1999) (en banc). Looking at these more recent authorities, we conclude that Florida Prepaid and Alsbrook undercut Mauney's abrogation analysis. Therefore, we reexamine the question whether a private citizen's suit for a violation of the IDEA may be brought against an unwilling state in federal court.

A.

To determine whether the IDEA abrogates the states' immunity, we begin, as Mauney and the subsequent decisions of this Court and the Supreme Court do, with the two-part Seminole Tribe test. See, e.g., Florida Prepaid, 119 S.Ct. at 2205; Alsbrook, 1999 WL 521709, at *4; Mauney, 1999 WL 407763, at *3. The first part of the Seminole Tribe test requires that a federal statute contain an "unequivocal expression" of Congress's intent to abrogate the states' immunity. See Seminole Tribe, 517 U.S. at 55. The IDEA contains an abrogation provision, 20 U.S.C. § 1403, which reads in part: "A State shall not be immune under the eleventh amendment to the Constitution of the United States from suit in Federal court for a violation of this chapter." 20 U.S.C.A. § 1403(a) (West Supp. 1999). In Mauney, a panel of this Court stated that the IDEA abrogation provision satisfies the first part of the Seminole Tribe test. See Mauney, 1999 WL 407763, at *4. The subsequent decisions of this Court and the Supreme Court do not undermine this part of Mauney: both Florida Prepaid and Alsbrook conclude that abrogation provisions that essentially mirror § 1403 satisfy the first part of the Seminole Tribe test. See Florida Prepaid, 119 S.Ct. at 2205 (stating the abrogation provision in the Patent and Plant Variety Protection Act, 35 U.S.C. § 296(a), satisfies the first part of the Seminole Tribe test); Alsbrook, 1999 WL 521709, at *4 (concluding the abrogation provision in the Americans with Disabilities Act, 42 U.S.C. § 12202 (1994), unequivocally expresses Congress's intent to abrogate the states' immunity). After examining these authorities, we believe Mauney's

determination that § 1403 offers an unequivocal expression of Congress's intent to abrogate the states' immunity remains correct.

The second part of the Seminole Tribe test requires that a statute be an appropriate exercise of Congress's constitutional powers for its abrogation provision to have effect. See Seminole Tribe, 517 U.S. at 55. The Supreme Court and this Court have recognized only one constitutional power under which Congress may abrogate the states' Eleventh Amendment immunity, the power granted Congress by § 5 of the Fourteenth Amendment. See Florida Prepaid, 119 S. Ct. at 2205-06; Alsbrook, 1999 WL 521709, at *4. Section 5 empowers Congress to "enforce, by appropriate legislation, the provisions" of the Fourteenth Amendment, including the Equal Protection Clause. See U.S. Const. amend. XIV, § 5; see also U.S. Const. amend. XIV, § 1 (containing the Equal Protection Clause, which commands that no state shall "deny to any person within its jurisdiction the equal protection of the laws").

Legislation is an appropriate exercise of Congress's § 5 power only when it is preventative or remedial. See City of Boerne v. Flores, 521 U.S. 507, 530 (1997). For legislation to be preventative or remedial, Congress must "identify the conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct." Florida Prepaid, 119 S. Ct. at 2207.

Because the briefs in this case were submitted prior to the Court's decision in Florida Prepaid, the parties did no pinpoint the constitutional transgressions Congress sought to remedy when it enacted the IDEA. "[G]uided by the principle that the propriety of any § 5 legislation 'must be judged with reference to the historical experience . . . it reflects,'" id., (quoting Boerne, 521 U.S. at 525), we have reviewed the legislative history and believe that Congress did not adequately identify the constitutional transgressions it sought to remedy when it

enacted the IDEA. Congress did identify significant disparities in the treatment of students with disabilities and those without disabilities, and made six relevant findings regarding these differences:

> (1) there are more than eight million children with disabilities in the United States today;
> (2) the special educational needs of such children are not being fully met;
> (3) more than half of the children with disabilities in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity;
> (4) one million of the children with disabilities in the United States are excluded entirely from the public school system and will not go through the educational process with their peers;
> (5) there are many children with disabilities throughout the United States participating in regular school programs whose disabilities prevent them from having a successful educational experience because their disabilities are undetected; [and]
> (6) because of the lack of adequate services within the public school system, families are often forced to find services outside the public school system, often at great distance from their residence and at their own expense.

20 U.S.C. § 1400(b)(1)-(6) (1994); see also Board of Educ. v. Rowley, 458 U.S. 176, 189 (1982) (discussing these congressional findings); Mauney, 1999 WL 407763, at *6 (same).

In making these six findings, however, Congress did not find that the disparate treatment of students with disabilities resulted from action by the state or, if it did, that such state action violated the Equal Protection Clause. Florida Prepaid requires that congress find that the states themselves are transgressing the constitution. See Florida Prepaid, 119 S. Ct.

at 2207 (stating that, when Congress enacted the patent infringement legislation at issue in that case, "Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations"). Congress did not purport to find that the disparate treatment of students with disabilities resulted form state action in violation of the Constitution, which requires states only to have a rational basis to justify treating students with disabilities differently from those without disabilities. See City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 445-46 (1985). Moreover, Congress did not indicate whether the states were treating students differently, or whether local school districts were responsible for the lack of education for disabled children that Congress sought to remedy when it enacted the IDEA.

Whether Congress correctly identified the constitutional transgressions it sought to remedy, however, is not decisive in this case. Even if we assume Congress adequately identified perceived constitutional transgressions it sought to remedy when it enacted the IDEA, Alsbrook requires us to conclude that the IDEA's abrogation provision is invalid because the IDEA is not an appropriate exercise of Congress's § 5 power. The same difficulty that this Court found with the ADA in Alsbrook applies to the IDEA in the present case. Like the ADA, the IDEA "does far more than enforce the rational relationship standard recognized by the Supreme Court in Cleburne." Alsbrook, 1999 WL 521709, at *6 (discussing the ADA). In many instances, programs rationally related to a legitimate state interest - and thus constitutional under Cleburne -- would be struck down as failing to satisfy the IDEA's requirement that students with disabilities receive a "free appropriate public education." 20 U.S.C. § 1400(c) (1994); cf. Alsbrook, 1999 WL 521709, at *6 (stating that, for the same reason, the ADA exceeds Congress's § 5 power). The Constitution would not, for example, require a local school district to provide the nursing care that the Supreme Court in Cedar Rapids Community School District v. Garrett F. ex rel.

Charlene F., 119 S. Ct. 992 (1999), determined the IDEA requires.

Although this Court in Mauney determined that the IDEA had the requisite congruence and proportionality to Congress's goal of providing equal educational opportunity for students with disabilities, see Mauney, 1999 WL 407763, at *11, we now must conclude that the IDEA extends beyond the power granted Congress by § 5 of the Fourteenth Amendment. The IDEA, therefore, cannot be an appropriate exercise of Congress's § 5 power, and its abrogation provision is not valid. See Alsbrook, 1999 WL 521709, at *5 (stating that, if legislation seeks to "expand, enhance, or add to the guarantees of the Fourteenth Amendment," that legislation's abrogation provision is invalid). The abrogation portion of Mauney has been undercut by subsequent events that have changed the legal landscape, and we believe that this portion of Mauney no longer represents current law.

B.

In addition to its abrogation holding, Mauney holds that Arkansas waived its Eleventh Amendment immunity by receiving funds appropriated under the IDEA. See Mauney, 1999 WL 407763, at *11. The Supreme Court's recent decisions add to the Court's waiver jurisprudence, see, e.g., College Savings, 119 S. Ct. at 2228 (rejecting the concept of constructive waiver), but these decisions do not affect Mauney's analysis of the waiver issue. Rather, the Supreme Court continues to recognize that Congress, if acting within its spending power, may condition a state's participation in a federal spending program on the state's waiving its Eleventh Amendment immunity to claims arising from that program. See College Savings, 119 S. Ct. at 2231; see also Alden, 119 S. Ct. at 2267. The waiver portion of Mauney has not been undercut by subsequent decisions. Thus this portion of

Mauney represents the law of the Circuit and we are bound by it.[5]

For a federal statute to produce a waiver of a state's immunity through the state's participation in a federal spending program, the statute must provide a clear expression of Congress's "intent to condition participation in the program[] . . . on a State's consent to waive its constitutional immunity." Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 247 (1985).[6] This Court noted in Mauney that there has been some unease in finding that § 1403, the IDEA's abrogation provision, satisfies this requirement, because § 1403 is entitled "Abrogation of state sovereign immunity" and does not mention waiver. See Mauney, 1999 WL 407763, at *11. Although § 1403 has some shortcomings that limit its use as a clear expression of Congress's intent to condition a receipt of IDEA funds on a state's waiving its immunity, another provision of the IDEA reinforces the warning contained in § 1403. That provision, IDEA § 1415, requires states to provide certain procedures for parents who wish to challenge a state's implementation of the "free appropriate public education" standard. See 20 U.S.C.A. § 1415(a) (West Supp. 1999). One of the procedures that must be provided is the opportunity to have IDEA decisions reviewed in federal court. See 20 U.S.C.A. § 1415(i)(2) (West Supp. 1999) (stating that

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[5] For the record, we would have reached the same conclusion regarding waiver even if we had decided the present case in advance of Mauney.

[6] In Part IV.B of this opinion, we identify three requirements a federal appropriations statute must satisfy before a state's participation in that spending program causes the state to waive its Eleventh Amendment immunity to suits arising from such participation. We do not analyze all three elements here because this Court already has determined in Mauney that Arkansas waived its immunity to suits arising under the IDEA by receiving IDEA funds, and because Arkansas conceded during oral argument that the IDEA was a valid exercise of Congress's spending power and that the state received funds under the IDEA.

parties who are aggrieved by a decision under that IDEA may file an action in a federal district court); see also 20 U.S.C.A. § 1415(i)(3)(A) (West Supp. 1999) (stating that "district courts of the United States shall have jurisdiction of actions brought under this section without regard to the amount in controversy"). When it enacted §§ 1403 and 1415, Congress provided a clear, unambiguous warning of its intent to condition a state's participation in the IDEA program and its receipt of federal IDEA funds on the state's waiver of its immunity from suit in federal court on claims made under the IDEA. We therefore hold in accordance with Mauney that Arkansas waived its Eleventh Amendment immunity with respect to IDEA claims when it chose to participate in the federal spending program created by the IDEA.

C.

The Bradleys argue that, even if the ADE could not be sued in federal court, Ex parte Young, 209 U.S. 123 (1908), allows them to seek to enjoin ADE officials, including defendant Crowley, from committing violations of federal law. We agree. Ex parte Young permits a private party to receive prospective injunctive relief in federal court against a state official, even if the Eleventh Amendment otherwise protects the state and its officials from being sued in federal court. See Ex parte Young, 209 U.S. at 155-56, 159, 166-68 (allowing a federal court to ignore a state's Eleventh Amendment immunity and impose prospective injunctive relief on state officials to enjoin a future violation of federal law); see also Missouri v. Jenkins, 491 U.S. 274, 279 (1989) (stating that a state's Eleventh Amendment immunity does not prevent "an award of attorney's fees ancillary to a grant of prospective relief" pursued under Ex parte Young).[7]

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[7] The Bradleys make no claim for compensatory or punitive damages, damages not being available for violations of the IDEA. See, e.g., Thompson v. Board of Special Sch. Dist. No.1, 144 F.3d 574, 579 (8th

Furthermore, even if Ex parte Young did not apply, the Bradleys could pursue any remedies available under the IDEA against Crowley because, when Arkansas waived its own Eleventh Amendment immunity with respect to IDEA claims, it also waived any Eleventh Amendment immunity Crowley might have had as a state official with respect to such claims. "The only immunities that can be claimed in an official-capacity action are forms of sovereign immunity that the entity, qua entity, may possess, such as the Eleventh Amendment." Kentucky v. Graham, 473 U.S. 159, 167 (1985). Under Graham, when Arkansas waived its own Eleventh Amendment immunity from suits brought under the IDEA, the state also waived the Eleventh Amendment immunity of its officials from such suits. See Duffy v. Riveland, 98 F.3d 447, 452, n.4 (9th Cir. 1996). The District Court, therefore, may exercise jurisdiction over the Bradleys' IDEA claims against Crowley and may provide any relief that the IDEA authorizes.

IV.

Next, we turn to Arkansas's contention that the Eleventh Amendment prevents the states from being forced to litigate in federal court claims arising under § 504 of the Rehabilitation Act. Section 504 states in part:

> No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. § 794(a) (1994). Arkansas concedes that the ADE receives federal funds, and apparently the state does not dispute that § 504 prohibits the ADE from discriminating on

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Cir. 1998); Heidemann v. Rother, 84 F.3d 1021, 1033 (8th Cir. 1996).

the basis of disability. The state does assert that the Eleventh Amendment bars federal courts from exercising judicial power over the state with respect to claims brought under § 504. Therefore, we apply the same analysis that we applied to the IDEA in Parts III.A and III.B of this opinion to determine whether Jim and Susan C. may pursue their § 504 claim against the ADE in federal court.

A.

To determine whether § 504 abrogates the states' Eleventh Amendment immunity, we again engage in Seminole Tribe's two-part analysis. First, the statute must contain an unequivocal expression of Congress's intent to abrogate the states' Eleventh Amendment immunity. In 1985, the court in Atascadero held that § 504 lacked the required expression of intent. See 473 U.S. at 247. Congress responded by enacting an abrogation provision, now codified as 42 U.S.C. § 2000d-7 (1994). See Lane v. Pena, 518 U.S. 187, 198 (1996) (discussing the legislative history of § 2000d-7). This abrogation provision states:

(a) General provision

(1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, Title VI of the Civil Rights Act of 1964, or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

(2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both a law and in equity) are available for such a violation to the same extent as such remedies are

> available for such a violation in the suit against any public or private entity other than a State.

42 U.S.C. § 2000d-7(a) (1994) (internal citations omitted). This Court already has concluded in Alsbrook and Mauney that abrogation provisions mirroring 42 U.S.C. § 2000d-7 adequately express Congress's intent to abrogate. See Alsbrook, 1999 WL 521709, at *4 (examining the ADA abrogation provision, codified at 42 U.S.C. § 12202 (1994)); Mauney, 1999 WL 407763, at *11 (examining the IDEA's abrogation provision, 20 U.S.C. § 1403). Because we find no material differences between § 2000d-7 and the abrogation provisions considered and found adequate in Alsbrook and Mauney, we conclude that § 504 also satisfies the first part of the Seminole Tribe test.

The second part of the Seminole Tribe test, as discussed supra in Part III.A, requires that a statute be an appropriate exercise of Congress's constitutional powers for the statute's abrogation provision to have effect. See Seminole Tribe, 517 U.S. at 55. The United States, intervening in this litigation, argues that § 504 is a valid exercise of Congress's power under § 5 of the Fourteenth Amendment. Congress did not rely expressly on its § 5 power when it enacted § 504 or its abrogation provision, 42 U.S.C. § 2000d-7. See Franks v. Kentucky Sch. for the Deaf, 142 F.3d 360, 363 (6th Cir. 1998). But there is no requirement that a statute specifically refer to § 5 of the Fourteenth Amendment for the statute to be a valid exercise of that constitutional power. See EEOC v. Wyoming, 460 U.S. 226, 243 n.18 (1983) (stating that Congress need not "recite the words 'section 5' or 'Fourteenth Amendment' or 'equal protection' for the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise" (internal quotation and citation omitted)); see also Humenansky v. Regents of the Univ. of Minn., 152 F.3d 822, 830 (8th Cir. 1998). "As long as Congress had such authority as an objective matter, whether it

also had the specific intent to legislate pursuant to that authority is irrelevant." Crawford v. Davis, 109 F.3d 1281, 1283 (8th Cir. 1997). Therefore, although the legislative history of § 504 does not mention § 5 of the Fourteenth Amendment, we must consider whether Congress has the constitutional power under § 5 of the Fourteenth Amendment to enact § 504. Accordingly, we examine whether Congress adequately identified the constitutional transgressions it sought to remedy, and whether § 504 is properly tailored, with the requisite congruity and proportionality, to remedy those transgressions. See Florida Prepaid, 119 S. Ct. at 2207; Boerne, 512 U.S. at 520.

When we consider the legislative history of § 504 and its abrogation provision, we find little indication that Congress properly identified constitutional transgressions it sought to remedy by enacting § 504. In fact, the legislative history is largely silent regarding the reason § 504 was included in the RA. The Joint Explanatory Statement of the Committee of the Conference, for example, does not mention § 504. See J. Conf. Rep. No. 93-500, reprinted in 1973 U.S.C.C.A.N. 2143; see also Richard K. Scotch, From Good Will to Civil Rights: Transforming Federal Disability Policy 54 (1984) ("It appears that most members of Congress either were unaware that § 504 was included in the act or saw the section as little more than a platitude, a statement of a desired goal with little potential for causing institutional change.") Similarly, the legislative history of the abrogation provision does not identify constitutional transgressions that make such a provision appropriate. The legislative history of § 2000d-7 instead reveals only that Congress sought to override the Supreme Court's decision in Atascadero by providing an unequivocal expression of Congress's intent to abrogate the states' immunity. See e.g., 132 Cong. Rec. S28622-24 (daily ed. Oct. 3, 1986) (statement of Sen. Cranston and attached letter from John R. Bolton, Assistant Attorney General, stating that the purpose of the Civil Rights Remedies Equalization Act is to remedy the

statutory flaw identified in Atascadero). The legislative history apparently lacks any indication of why Congress thought such abrogation was necessary or appropriate.

We again refrain from relying on Congress's failure to identify properly the evil it sought to remedy, however, because this issue was not fully briefed and would not affect the outcome of our analysis. Instead, Alsbrook compels us to conclude that § 504 reaches beyond the scope of Congress's § 5 power. As noted supra in Part III.A, this Court determined in Alsbrook that Title II of the ADA exceeds Congress's § 5 power because the ADA is not merely remedial, but provides substantive rights in excess of those that are protected by the Constitution from impairment by government action. See Alsbrook, 1999 WL 521709, at *6. Alsbrook requires us to reach the same conclusion here, because the ADA and § 504 provide essentially the same protections for the same group of individuals, people with disabilities. See § 29 U.S.C. 794(d) (1994) (directing that courts should use the same standard to determine if § 504 and the sections of the ADA relating to employment have been violated).[8] The only difference between the ADA and § 504 is § 504's application only to recipients of federal funds. See Randolph v. Rogers, 170 F.3d 850, 858 (8th Cir. 1999) ("The ADA and [§ 504 of the] RA are 'similar in substance' and, with the exception of the RA's federal funding requirement, 'cases interpreting either are applicable

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[8] Regulations promulgated under the RA require schools to provide a "free appropriate public education," the same standard imposed by the IDEA. See e.g., 34 C.F.R. § 104.33(a) (1998) (requiring recipients of federal funds that operate public elementary or secondary education programs to provide a free appropriate public education to qualified persons with disabilities). We already have determined that the "free appropriate public education" standard exceeds the constitutional burdens imposed by the Equal Protection Clause. See supra Part III.A. These regulations, therefore, do not save § 504's abrogation provision.

and interchangeable.'") (quoting Gorman v. Bartch, 152 F.3d 907, 912 (8th Cir. 1998)). This distinction is immaterial to our § 5 analysis.

This Court determined in Alsbrook that the ADA employment provisions were not an appropriate exercise of Congress's § 5 power because the ADA imposes duties upon the states exceeding those commanded by the Fourteenth Amendment. Applying the reasoning of Alsbrook, we conclude that § 504 does not abrogate the states' Eleventh Amendment immunity.[9]

B.

We next consider whether Arkansas waived its Eleventh Amendment immunity with respect to claims arising under § 504 by accepting federal funds. Examining the Supreme Court's decisions in Atascadero and Pennhurst State School & Hospital v. Halderman, 451 U.S. 1 (1981), we find three

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[9] In concluding that § 504 does not abrogate the states' immunity, we recognize the existence of decisions ot the contrary by the Fourth, Fifth and Ninth Circuits that predate the Supreme Court's Alden trilogy. See Amos v. Maryland Dep't of Pub. Safety & Correctional Servs., 178 F.3d 212, 222-23 (4th Cir. 1999); Coolbaugh v. Louisana, 136 F.3d 430, 438 (5th Cir.), cert. denied, 119 S. Ct. 58 (1998); Clark v. California, 123 F.3d 1267, 1270 (9th Cir. 1997), cert. denied, 118 S. Ct. 2340 (1998). We also are aware of dicta contained in earlier Supreme Court opinions to the effect that § 504 abrogated the states' immunity. See e.g., Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 72 (1992) (in which the Court, while considering whether Title IX creates an implied right of private action, stated that Congress when enacting 42 U.S.C. § 2000d-7 "abrogated the States' Eleventh Amendment immunity under Title IX, Title VI, § 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975"). This sort of dicta, unsupported by Seminole Tribe's abrogation analysis, is probably best read simply as a statement of historical legislative fact rather than as a statement of constitutional law. To give it import as a statement of constitutional law would be to render it out of step with the Court's more recent decisions.

requirements that must be satisfied if a state's participation in a federal spending program is to be held to constitute a waiver of the state's Eleventh Amendment immunity against claims arising under that program. The three requirements are: (1) the federal spending program must represent a valid exercise of Congress's spending power; (2) the statute creating the federal spending program must contain a clear, unambiguous warning that Congress intends to exact waiver of Eleventh Amendment immunity as a condition for participating in the program; and (3) the state must have participated in the federal spending program. See Atascadero, 473 U.S. at 247; Pennhurst 451 U.S. at 17; see also, Abril v. Virginia, 145 F.3d 182, 190-91 (4th Cir. 1998) (formulating a two-factor test to determine if states have waived their immunity).

Section 504 fails the first requirement because it is not a valid exercise of Congress's spending power. College Savings recognizes that Congress may require states to comply with conditions to receive federal funds, including waiving their Eleventh Amendment immunity. See College Savings, 119 S. Ct. at 2231. College Savings warns, however, that "the financial inducements offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion." Id. (internal quotations and citations omitted). There are also limitations on the conditions that Congress may impose on a state's receipt of federal funds. One of these limitations is that "conditions must ... bear some relationship to the purpose of the federal spending; otherwise, of course, the spending power could render academic the Constitution's other grants and limits of federal authority." New York v. United States, 505 U.S. 144, 167 (1992) (internal citation omitted).

Section 504 and its abrogation provision impose overly broad conditions on state agencies such as the ADE. Section 504 prohibits "any program or activity receiving federal funding" from treating an individual differently "solely by reason of" that person's disabilities. See 29 U.S.C. § 794(a).

"Program or activity" is defined broadly to include "all of the operations" of state departments, agencies, or instrumentalities. See 29 U.S.C. § 794(b)(1)(A). With these provisions, § 504 mandates that Arkansas waive its Eleventh Amendment immunity to all claims arising under § 504 if it receives any federal funding, even funding unrelated to the state's obligations to comply with § 504 or the rest of the RA.

Congress's imposition of such conditions on a state violates the Constitution because it amounts to impermissible coercion: Arkansas is forced to renounce all federal funding, including funding wholly unrelated to the RA, if it does not want to comply with § 504. Congressional imposition of such a condition does not give Arkansas, or any other state, a meaningful choice regarding whether to receive federal funding and waive its Eleventh Amendment immunity to suits arising under § 504 or reject funding and retain its Eleventh Amendment immunity to such suits.

The condition § 504 imposes on recipients of federal funds exceeds the ordinary quid pro quo involved in a proper exercise of Congress's spending power. See Pennhurst, 451 U.S. at 17 (stating that "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress's power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'"). Therefore, § 504 is not a valid exercise of Congress's spending power, and Arkansas by receiving federal funds did not waive its Eleventh Amendment immunity to suits arising from alleged violations of § 504. We reverse the District Court's order in Jim C. to the extent it holds that it may exercise jurisdiction over Jim and Susan C.'s § 504 claim, and remand the case to the District Court for dismissal of the claim on the basis of Arkansas's Eleventh Amendment immunity.

V.

For the reasons stated above, we affirm the orders in 98-1010 and 98-1830 with regard to the IDEA, not on the abrogation grounds upon which those orders relied, but on the grounds that Arkansas waived its Eleventh Amendment immunity with respect to claims arising under the IDEA by voluntarily participating in this federal spending program. We reverse the order in 98-1830 to the extent it rejects Arkansas's assertion of Eleventh Amendment immunity with respect to Jim and Susan C.'s claim that the ADE violated § 504 of the Rehabilitation Act, and remand for dismissal of the plaintiffs' § 504 claim on the basis of the state's Eleventh Amendment immunity. Both cases are remanded for further proceedings consistent with this opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

JIM AND SUSAN C., individually and as parents and next friends of J.C. PLAINTIFFS

VS. LR-C-96-748

ATKINS SCHOOL DISTRICT, ARCH FORD EDUCATION SERVICE COOPERATIVE, and ARKANSAS DEPARTMENT OF EDUCATION DEFENDANTS

MEMORANDUM OPINION AND ORDER

Several motions are now pending before the Court in this matter. The Court has decided to address first the threshold issue of whether plaintiffs' Complaint against separate defendant Arkansas Department of Education ("ADE") is barred by the Eleventh Amendment to the United States Constitution. After a review of the parties' submissions, and for the reasons set forth in this Memorandum Opinion, the Court will grant in part and deny in part ADE's motion to dismiss based upon Eleventh Amendment immunity. However, the Court will hold in abeyance ADE's motion to dismiss and motion for summary judgment as to the remaining claims against it. The Court will further hold in abeyance plaintiffs' pending motions for summary judgment. Further, the Court will grant a continuance in this matter and will issue an Amended Scheduling Order in the near future.

I. BACKGROUND

A. General Background

Plaintiffs bring their Amended Complaint and Application for Injunctive Relief pursuant to 42 U.S.C. § 1983, the

Rehabilitation Act of 1973 (the "RA"),[1] the Individuals with Disabilities Education Act (the "IDEA"),[2] and the Fourteenth Amendment, Plaintiffs, who are husband and wife, contend that their child J.C. was diagnosed in November 1994 as having autism and is therefore a child with disabilities as defined in 20 U.S.C. § 1410(a)(1). Plaintiff was, at times relevant to this action and presently, a student in the Atkins School District. When J.C.'s first Individualized Educational Plan ("IEP") was drafted, his parents requested an intervention program called the Lovaas program ("Lovaas"). Plaintiffs state that Lovaas requires approximately 40 hours per week of one-on-one training. Plaintiffs further maintain that an IEP was adopted in October 1995, which allowed J.C. 19 hours of Lovaas per week. In January 1996, plaintiffs requested additional services in order to "fully implement ABA/Lovaas with J.C. at 40 hours per week." Amended Complaint ¶ 33. They assert that around February 14, 1996 the "administratively-directed IEP team" ruled out intensive Lovaas intervention, as well as other necessary components of occupational therapy and direct speech and language therapy. A due process hearing with the Arkansas department of Education[3] followed on March 4 and April 4, 1996. Plaintiffs assert that the Hearing Officer improperly assigned burdens of proof and persuasion to J.C.'s parents. Plaintiffs represent that the resulting August 21, 1996 Hearing Officer's Report and Decision found that services provided under J.C.'s initial IEP met the legal standard of appropriateness. Plaintiffs contend that defendants have gone on to violate J.C.'s substantive rights to "extended year summer services."

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[1] 29 U.S.C. § 701, *et seq.*

[2] 20 U.S.C. § 1400, *et seq.*

[3] James M. Ammel, presiding Hearing Officer.

Plaintiffs assert that defendants "have violated J.C.'s substantive rights under IDEA and Section 504 of the Rehabilitation Act by failing to offer an appropriate educational program." *Id.* ¶ 8. They maintain that all defendants have acted under color of state law to discriminate against plaintiffs' pursuit of a free appropriate education under the IDEA. Citing 20 U.S.C. § 1415(e)(2), plaintiffs seek appeal and reversal of the Hearing Officer's Decision on both procedural and substantive grounds. They further seek an Order directing ADE to amend J.C.'s IEP to provide specified Lovaas services and other relief constituting an "appropriate free public education." They also seek various forms of damages, and an Order directing defendants to comply with 20 U.S.C. § 1413(a)(3)(A) & (B) and 34 C.F.R. § 300.382 by disseminating certain Lovaas information.

B. Allegations Specific to ADE

Plaintiffs assert that the IDEA expressly charges the State of Arkansas with the duty of establishing "effective procedures for acquiring and disseminating . . . significant information derived from educational research, demonstration, and similar projects." Amended Complaint ¶ 14 (citing 20 U.S.C. § 1413(a)(3)(A)). They further aver that the State is responsible for implementing "effective procedures for . . . adopting, where appropriate, promising educational practices. . . ." *Id.* ¶ 15 (citing 20 U.S.C. § 1413(a)(3)(B)). Plaintiff's allege ADE has failed to satisfy either of these statutory directives, contending that the State has "engaged in an active campaign to frustrate the dissemination and implementation of promising educational research in the area of applied behavior analysis, as practiced intensively—ABA/Lovaas." *Id.* ¶ 16. They assert that "[m]eeting these 'two clear statutory directive[s]' is absolutely foundational to the ability of the Defendants to invoke the Hearing Officer's and/or this court's deference to the Defendant's 'choice' of methodology." *Id.* ¶ 17.

Plaintiffs contend that the State's active campaign to frustrate the dissemination and implementation of promising educational research in the area of Lovaas has caused a substantial risk of irreparable harm to J.C. and all other similarly situated autistic students in Arkansas. *Id.* ¶ 51. Plaintiffs request an Order directing the ADE to take effective, affirmative action, under a specific written plan of activities and timetables to comply with 20 U.S.C. § 1413(a)(3)(A) and (B), and 34 C.F.R. § 300.382 by disseminating significant information derived from the educational research of O. Ivar Lovaas, the U.S. Department of Education Lovaas demonstration grant project of Montgomery County, Maryland, and similar projects of ABA practitioners using intensive applied behavior analysis. They further request an Order directing the ADE to adopt promising educational practices for autistic children in Arkansas.

ADE first argues that the Court lacks subject matter jurisdiction because the Eleventh Amendment bars claims against ADE under state law, § 1983, the RA and the IDEA. Second, ADE contends that plaintiffs fail to state a claim upon which relief may be granted. Third, ADE claims that it clearly complied with its mandate under the IDEA and RA, and, therefore, that summary judgment in its behalf is proper. Finally, defendant contends that plaintiffs are not entitled to compensatory damages.

II. DISCUSSION

A. Eleventh Amendment Immunity

The Court must first address the threshold issue of whether it has jurisdiction over the claims brought against the Arkansas Department of Education. Generally, the Eleventh Amendment bars suits against States and their agencies. It does not bar such suits which only seek prospective injunctive relief to prevent future violations of federal law. *Ex Parte Young*, 209 U.S. 123 (1908); *Trevelen v. University of Minnesota*, 73 F.3d

816, 819 (8th Cir. 1996). Furthermore, the Supreme Court has held that Congress may abrogate the States' Eleventh Amendment immunity if it unequivocally expresses its intent to do so. *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 114 (1996). Therefore, to the extent that plaintiffs seek only prospective injunctive relief,[4] their suit does not fall within the Eleventh Amendment's prohibition. The Court also concludes that Congress has permissibly abrogated ADE's Eleventh Amendment immunity as to plaintiffs' IDEA and RA claims. However, ADE is entitled to Eleventh Amendment immunity as to plaintiffs' § 1983 claim and any other claim seeking monetary damages under state law.

1. Eleventh Amendment Immunity under the Individuals with Disabilities Education Act

Congress has abrogated immunity under the IDEA.[5] ADE argues that Congress exceeded its power under § 5 of the Fourteenth Amendment because the IDEA is not rationally related to the Fourteenth Amendment's subject matter. Recently in this District, the Honorable James M. Moody was faced with the same issue. *Bradley v. Arkansas Department of Education, et al.*, USDC LR-C-96-1004 (E.D. Ark. 1997), Doc. No. 41. There, he stated:

> If Congress enacted the IDEA pursuant to [a] valid exercise [of] its powers under § 5 of the Fourteenth Amendment, a state does not have Eleventh Amendment immunity. *See Seminole*, 116 S. Ct. at 1125. The Court is not aware of any circuit court decision ruling on this issue. However, a district court has held that Congress enacted the IDEA under a valid exercise of its powers under § 5 of the

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[4] Amended Complaint, Prayer for Relief ¶ (H).

[5] "A State shall not be immune under the eleventh amendment to the Constitution of the United States from suit in Federal court for a violation of this chapter." 20 U.S.C.A. § 1403(A) (West 1997).

> Fourteenth Amendment. *Peter v. Johnson*, 958 F. Supp. 1383, 1394 (D. Minn. 1997). This Court agrees. In enacting the IDEA, Congress found that it is in "the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of children with disabilities in order to assure equal protection of the law." 20 U.S.C. § 1400(b)(9). Thus, the Court finds that *the IDEA was enacted pursuant to Congress' authority under § 5 of the Fourteenth Amendment and effectively abrogates immunity under the Eleventh Amendment.*

Id. at 4 (emphasis supplied).

This reasoning is sound. The court is not unmindful that Congress may not constitutionally exceed its enumerated powers. However, after carefully reviewing the parties' submissions, their arguments and the applicable law, the Court is of the opinion that the IDEA was constitutionally enacted to assure equal protection of children with disabilities.[6] Moreover, Congress clearly and unequivocally abrogated the States' Eleventh Amendment immunity under the IDEA. Therefore, ADE is not entitled to Eleventh Amendment immunity as to plaintiffs' IDEA claim.

2. *Eleventh Amendment Immunity under the Rehabilitation Act*

The same analysis applies to a consideration of whether Congress has permissibly abrogated Eleventh Amendment immunity under the Rehabilitation Act.[7] ADE cites several

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[6] *See also Emma v. Eastin*, 1997 WL 781230, at *6 (N.D. Cal. Oct. 17, 1997) (concluding that the IDEA, ADA and RA abrogations were enacted pursuant to Congress' powers under § 5 of the Fourteenth Amendment, and thus were valid exercises of power).

[7] 42 U.S.C. § 2000d-7 provides that "[a] State shall not be immune under the Eleventh Amendment . . . for a violation of section 504 of the

prison cases as support for its position that Congress exceeded its Constitutional power.[8] This Court has previously held that the ADA and RA apply to state correctional facilities. *Herndon v. Johnson*, 970 F. Supp. 703 (E.D. Ark. 1997). In that case, the Court opined that "Congress has spoken on this point and has acted within its power under the Supremacy Clause and the Fourteenth Amendment to upset the states' general freedom to conduct state functions as they desire." *Id.* at 708. This Court subsequently declined another request by the Arkansas Department of Correction to reject Congress' abrogation of the Eleventh Amendment under the Rehabilitation Act in *Moore v. Norris, et al.*, USDC LR-C-97-506 (E.D. Ark. 1997), Doc. No. 51. The Court noted that "the history of the ADA and Section 5 jurisprudence leads the Court to the conclusion that Congress did not invalidly abrogate Eleventh Amendment immunity under the ADA and RA." In sum, this Court has several times upheld Congress' abrogation of Eleventh Amendment immunity under the RA, and the Court will not depart from these prior holdings absent some further guidance from the Eighth Circuit or Supreme Court.

3. Eleventh Amendment Immunity Under Section 1983

Arkansas Department of Education argues that plaintiffs' § 1983 lawsuit against it is barred by the Eleventh Amendment immunity. Plaintiffs have not disputed this argument. A review of the Complaint and Amended Complaint makes it unclear whether plaintiffs are attempting to assert a § 1983 claim directly against ADE. However, absent consent or Congressional abrogation, a private party may not sue a State

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Rehabilitation Act."

[8] *Amos v. Maryland Dept. of Public Safety & Corrections*, ___ F.3d ___, 1997 WL 581652 (4th Cir. 1997); and *Torcasio v. Murray*, 57 F.3d 1340 (4th Cir. 1995), *cert. denied sub nom. Torcasio v. Angelone*, 116 S. Ct. 772 (1996).

or its agencies seeking damages. *See Alabama v. Pugh*, 98 S. Ct. 3057 (1978); *Nix v. Norman*, 879 429 (8th Cir. 1989). By enacting § 1983, Congress did not abrogate the Eleventh Amendment. *See Quern v. Jordan*, 99 S. Ct. 1139 (1979). Moreover, plaintiffs have not advanced an argument for consent. Therefore, the Court concludes that it does not have subject matter jurisdiction to entertain a § 1983 claim for damages against ADE. Furthermore, recovery of damages against ADE under any other theory of damages (absent some exception to the Eleventh Amendment) will not be allowed in this lawsuit.

B. ADE's Motion to Dismiss and Motion for Summary Judgment

Having decided that ADE is not cloaked with immunity as to the IDEA and RA claims, the Court now faces defendant's motion to dismiss and motion for summary judgment as to those issues. At this point, the Court will hold in abeyance both motions until it can address all pending issues in this matter.

C. Motion for Continuance

In its motion, ADE asserts that "[s]hould the Court deny this motion, ADE is entitled to a continuance and stay of proceedings in this matter pending an interlocutory appeal." Neither party has briefed this issue. However, in light of the Court's rulings herein, the Court will continue this case indefinitely. The Court will enter an Amended Scheduling Order in the near future.

III. CONCLUSION

To recap, the Court has held as follows:

1. ADE does not have Eleventh Amendment immunity for claims brought under the RA and IDEA.

2. ADE does have Eleventh Amendment immunity for claims seeking damages under § 1983 or State law.

3. ADE's motion to dismiss plaintiffs' IDEA and RA claims shall be held in abeyance.

4. ADE's motion for summary judgment as to plaintiffs' IDEA and RA claims shall be held in abeyance.

5. The Court hereby grants an indefinite continuance of the trial date in this matter and will enter an Amended Scheduling Order in the near future.

IT IS THEREFORE ORDERED that Arkansas Department of Education's Motion[9] be, and it is hereby, GRANTED IN PART and DENIED IN PART. The above Conclusion summarizes the Court's holdings.

Dated this 23rd day of February, 1998.

/s/ Garnett Thomas Eisele

UNITED STATES DISTRICT JUDGE

[9] Doc. #35.

Supreme Court, U.S.
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No. 00-1488

IN THE
SUPREME COURT of the UNITED STATES

ARKANSAS DEPARTMENT OF EDUCATION,

Petitioner,

v.

JIM C. AND SUSAN C, INDIVIDUALLY AND AS PARENTS AND NEXT FRIENDS OF J.C., and

UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Arkansas Department of Education which receives federal financial assistance must conduct itself in accordance with the explicit conditions on the receipt of federal financial assistance set forth in a federal spending clause statute?

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IN THE
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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

OPINIONS BELOW

The en banc opinion of the court of appeals (App. 1a-15a) is reported at 235 F.3d 1089. The opinion of the panel (App. 16a at 35a-37a), acting by two judges under 28 U.S.C. §46(d), is reported at 189 F.3d 745 at 757-58. The memorandum opinion and order of the district court (App. 39a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 2000. The petition for writ of certiorari was docketed on March 27, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

COUNTER-STATEMENT

1.The district court held Section 504 enforcible, notwithstanding the Eleventh Amendment. Arkansas Department of Education's opening brief to the court of appeals nonetheless said, "It is not clear in the complaint that plaintiffs seek to bring a §504 action against A.D.E." (Appellant's Br.16) and did not brief the Spending Clause. It's Fed.R.App.P., Rule 10(b)(3) statement raised the Eleventh Amendment only as to the Individuals with Disabilities Education Act, 20 U.S.C. §1400 et seq.. It's subsequent joint motion to consolidate Jim C. with Bradley v. Arkansas Department of Education, which raised only IDEA (and which the Bradley appellees opposed), represented that "[t]he issues in the instant appeal and the Bradley appeal are identical. Both appeals were taken by the Arkansas Department of Education to determine whether the district court properly ruled that the Individuals with Disabilities Act (IDEA) may be enforced against a State employee sued in his official capacity." The Bradley brief, which the Jim C. parties adopted, addressed only IDEA. The United States addressed section 504 briefly. Arkansas Department of Education's reply addressed only IDEA.

2. Upon that confused and incomplete record, a two judge panel[1] misread Section 504's definition of program, transmuting the statute's singular—"program or activity

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[1] After Judge Kelly died, the panel decide the case under 42 U.S.C. §46(d) and 8th Circuit R. 47E.

means all of the operations of . . . a department, [an] agency, or [an] other instrumentality," 29 U.S.C. §794(b)—into the panel's plural: "Program or activity is defined broadly to include all of the operations of state departments, agencies, or instrumentalities." App. 37a; 189 F.3d at 757 (emphases supplied). The panel thus erroneously found that "with these provisions Section 504 mandates that Arkansas [as a whole, all of it] waive its Eleventh Amendment immunity to all claims arising under §504 if it receives any federal funding [any, for any purpose]" and, also erroneously, that "Arkansas [the whole, all of it] is forced to renounce all federal funding . . . if it does not want to comply with §504." Ibid.

Upon that predicate, the panel held that "Congress' imposition of such conditions on a state violates the Constitution because it amounts to impermissible coercion. Congressional imposition of such a condition does not give Arkansas, or another state, a meaningful choice regarding whether to receive federal funding and waive its Eleventh Amendment immunity to suits arising under §504 or reject funding and retain its Eleventh Amendment immunity to such suits."

3. En banc, the Court of Appeals reversed. It found that under the statutory definition, "the State itself as a whole is not a program or activity," "only the department or agency which receives or distributes the aid is covered," and "[t]he acceptance of funds by one agency leaves unaffected both other state agencies and the State as a whole." 3a-4a; 235 F.3d at 1081. Upon this predicate, the court of appeals en banc held the decision by the Arkansas Department of Education to accept federal education funds to be uncoerced and the Section 504 conditions germane to federal education funding. Relying upon Lane v. Peña, 518 U.S. 187, at 192 (1996), the court held Section 504's waiver provision (20 U.S.C. §2000-7(a)(1)) to be clear and unambiguous. The author of the en banc opinion was a member of the panel whose opinion was affirmed in South Dakota v. Dole, 483

U.S. 203 (1987). The minority of the court would have held the 504 conditions to be non-germane and coercive.

4. Petitioner sought no stay of the mandate pending its request for certiorari here. In consequence the mandate was returned, and on March 23, 2001 the district court granted summary judgment against plaintiffs and dismissed the complaint with prejudice. The district court subsequently denied plaintiffs' motion for reconsideration. Plaintiffs do not intend to file an appeal from the district court's decision.

REASONS FOR DENYING THE WRIT

1. This Matter is Not Worthy of Certiorari and Is Moot

The en banc decision below is not in conflict with any decision of any other United States court of appeals. It is the first and only court of appeals decision considering section 504 under the Spending Clause.

The absence of any factual record concerning federal financial assistance received by the Arkansas Department of Education, or concerning the Arkansas Department's decision to accept federal education funding makes this an inappropriate case for deciding the issues presented for decision here. Because Petitioner has been equivocal even about whether 504 is in the case, no question concerning section 504, the Eleventh Amendment, the Spending Clause, federal education spending, or the Arkansas Department of Education itself is adequately developed for resolution here.

Furthermore, this case and controversy is now over. After decision below en banc, Petitioner sought no stay of mandate pending application for certiorari. This case has gone to judgment and been dismissed with prejudice in the district court.

This is not a case which became moot before the court of appeals rendered its judgment or after this Court has granted

certiorari. Rather this case became moot after judgment in the court of appeals but before this Court has acted on any petition for certiorari.

In this circumstance, the rationale for vacatur does not apply and the Court should deny certiorari. A losing party has no right to Supreme Court review; review here is discretionary and exercised circumspectly. Sup.Ct.R. 10. If the Court would have denied certiorari in any event, there is no unfairness in leaving the lower court's decision intact. *See Note, Collateral Estoppel and Supreme Court Disposition of Moot Cases.* 78 Mich.l.Rev. 946, 953-58 (1980). As a general rule, where the judgment would not otherwise have been reviewed by the Court, vacatur would disserve the public interest by eliminating a judicial precedent that the judicial system regards as "presumptively correct," U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18, 26 (1994), and would give the Petitioner a windfall (of its own making) that it would not have received if the controversy had remained alive.

The Court has denied certiorari in a number of such cases. Velsicol Chemical Corp. v. United States, 435 U.S. 942 (1978); Electro-Voice, Inc. v. National Labor Relations Board, 519 U.S. 1055 (1997); Enron v. Power Marketing, Inc. v. Northern States Power Co., 528 U.S. 1182 (2000). See Robert Stern, *et al.*, *Supreme Court Practice* 724 and n.29 (7th ed. 1993) (Court has "seemingly accepted this suggestion of the Solicitor General that it need not consider the often difficult question of mootness at the certiorari stage when a case is otherwise not worthy of review. In such cases the Court will merely deny certiorari.")

The certiorari petition here should be denied because the decision below, in the end, would not have warranted review by the Court.

2. Germaneness and Non-Coercion

Petitioner does not challenge the unambiguous clarity of Section 504's statement of "the conditions upon which moneys shall be expended," United States v. Butler, 297 U.S. 1, 73 (1936), accompanying federal education funds which the Arkansas Department of Education has chosen to accept:

"No otherwise qualified individual with a disability . .. shall, solely by reason of his or her disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. §794(a) and (b).
and
"A state shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504." 42 U.S.C. §2000d-7; see 1986 U.S.C.C.A.N. 3554.

There can be no doubt that the Arkansas Department of Education is the program covered by section 504.[2]

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[2] The cognate statutes, Section 504, Title IX, and Title VI, do not bind solely federal expenditures which proceed from the act in which each appears—section 504 is in Title V, entitled "Rights and Advocacy," in the Rehabilitation Act of 1973, as amended; section 901, which contains counterpart conditions as to gender is in Title IX of the Education Act of 1972, as amended; section 601, containing counterpart conditions as to race, color or national origin, is in Title VI in the Civil Rights Act of 1964, as amended. Each binds federal financial assistance from whatever act such assistance arises.

Title IX has been held to be a valid Spending Power enactment, Grove City College v. Bell, 465 U.S. 555, 575-76 (1984); and the Court has repeatedly treated it as such. E.g.

Petitioners raise instead germaneness and non-coercion.[3] But the Court has been generous in its guidance on these matters and has not suggested that unambiguous conditions like those set forth here are beyond Congress' power. New York v. U.S. 505 U.S. 144, 167, 171-173 (1992); South Dakota v. Dole 483 U.S. 203 (1987); Massachusetts v. United States, 435 U.S. 444, 461 (1978); Ivanhoe Irrigation District v. McCracken, 357 U.S. 275, 295 (1958); Oklahoma v. United States Civil Service Commission, 330 U.S. 127, 143-144 (1947); Steward Machine Company v. Davis, 301 U.S. 548, 589-590 (1937); Massachusetts v. Mellon, 262 U.S. 447, 482 (1923). Compare Board. of Education of Westside Community Schools v. Mergens, 496 U.S. 226, 241 (1990); with City of Boerne v. Flores, 521 U.S. 507 (1997).

The test of germaneness, of course, is whether unambiguous conditions accompanying the grant of federal funds are related to the purposes for which the federal grants are made. Petitioner inverts the test. It is not, as Petitioner asserts (at page 9 n.3. next to last sentence), that "the

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Davis v. Monroe County Bd. of Educ., 119 S.Ct. 1661, 1669-70 (1999); Franklin v. Gwinett County Pubic Schools, 503 U.S. 60, 74-75 n.8 (1992). Title VI was held a valid Spending Clause enactment in Lau v. Nicholas, 414 U.S. 563, 569 (1974). And see Guardians Ass'n v. United States Civil Service Comm'n, 463 U.S. 582, 598-99 (1983); Cannon v. Univ. of Chicago, 441 U.S. 677, 708-09 (1979).

[3] They do so with no understatement: " court of appeals paid . . . only lip service"; "court of appeals . . . makes a mockery"; "reasoning that would make the Spending Clause virtually unlimited"; "case cries out," "eviscerates." Petition at 11& 6, 8 & 14.

[spending] programs" must be "related to assisting or preventing discrimination against the handicapped, the objective of section 504." Rather, such conditions must . . . bear some relationship to the purpose of the federal spending," New York v. United States, 505 U.S. 144, 167 (1992) (citing South Dakota v. Dole); ". . . condition grants under the spending power only in ways reasonable related to the purpose of the federal program," Massachusetts v. United States, 435 U.S. 444, 461 (1978): ". . . reasonably conditions relevant to federal interest in the project and to the overall objectives thereof," Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 295 (1958) (all emphases supplied).

As ballast to Arkansas Department of Education's representation that "the vast majority of [its federal funding] has nothing to do with section 504's goal" (Pet. at 3) and "the vast bulk of federal funding of education serves entirely distinct purposes" (Pet. at 9), it constructs, Pet. at 9 n.3, a list of examples presumably chosen to demonstrate that the grant condition here is not related to the purposes of the education spending. Instead, they show the opposite.

The purpose of spending under the Higher Education Amendment of 1998, Title VIII, Part B,[4] which Petitioner uses for its first example, is "to increase participation of low-income students in advanced placement courses." The 504 condition upon this federal funding provides "no otherwise qualified individual with a disability shall, solely by reason of her or his disability . . . , be excluded from participation in [advanced placement courses], be denied the benefits of [advanced placement courses], or subjected to discrimination under [the advance placement courses]." This condition barring the exclusion of qualified students with a disability thus directly relates to—and advances—the federal interest in

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[4] Petitioner miscites the provision's codification. It is 20 U.S.C. §1070a-11 note. See also 112 Stat. 1808.

and the purpose of this federal funding—namely, as Petitioner itself identifies the purpose, to increase participation of low-income students in advanced placement courses.[5]

Likewise, with the seven other examples of federal funds for education which Petitioner arrays in its failed effort to suggest that the section 504 condition is not germane to the purposes federal education funding statutes are designed to advance. It may be that "none of these programs is even remotely related to assisting or preventing discrimination against the handicapped," Petitioner's backward way of

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[5] Petitioner may have chosen this example for its facial strangeness, its unlikeliness, to people who may not know disabled students and would expect disabled children can't benefit from advanced placement courses. But some can , for example, Garrett F., respondent in Cedar Rapids Community School District, v. Garrett F., 526 U.S. 66, 69 (1999), had severe orthopedic disabilities, but was very capable cognitively. There are many such students, with physical disabilities, learning disabilities, Asperger's syndrome, even Down syndrome, sufficient that in 1998 Congress amended the Individuals with Disabilities Education Act to require: "beginning at age 14 . . . a statement of the transition service needs . . . that focuses on the child's courses of study (such as participation in advanced-placement courses or a vocational education program)." 20 U.S.C. §1414(d)(A)(vii)(I)(parentheses in statute). See generally, *K.Kay (ed.), Uniquely Gifted: Identifying and Meeting the Needs of the Twice Exceptional Student* (Vocus Pub. 2000); S. Baum *Gifted and Learning Disabled: From Definition to Practical Intervention* (Creative Learning Pr. 1991); T. Ellston, "To Be Gifted and Learning Disabled: A Paradox?" in *Gifted Child Today v.16, n1, p.17 (Jan/Feb 1993)*; S. Baum, "Gifted But Learning Disabled: A Puzzling Paradox" in *Preventing School Failure*, v. 34, no.1, p.11(1989).

stating the test for germaneness and non-coercion (Pet. n.3), but preventing discrimination in these education programs against children with handicaps is related to the achievement of the educational purposes of each.[6]

The other condition here, if a department chooses to take education funds, it chooses also to abide by federal court enforcement of the condition that qualified children with disabilities can not be excluded therefrom, be denied the benefits thereof or be subjected to discrimination thereunder, is also plainly related to the achievement of those educational purposes.

As with germaneness, so with non-coercion. With its constantly repeated refrain throughout, "all federal funding"—"any federal funding"—"for any purpose," Petitioner obscures the difference between a condition that extends only to the federally assisted department and one that runs to all of Arkansas' programs irrespective of whether they receive funds, as if to clothe itself in the statutory mistake which the panel made.[7] Petitioner's coercion argument seems

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[6] Variously (Pet. n.3), "to foster bilingual education, ... to encourage school attendance by homeless students; . . . to provide for professional development of teachers; . . .to assist schools with large immigrant populations; . . . to address the special needs of migrant children [and those] of neglected or delinquent children; . . . and to combat drugs and violence in schools." Not to exclude qualified children with disabilities, and in one instance teachers with disabilities, is certainly related to and in each instance serves the educational purpose of the funding statutes.

[7] At its rhetorical height (Pet. at 12-13), the Petition employs the ambiguity of the collective phrase 'all state agencies': " . . . as permitted under the court of appeal's decision, the Congress could secure a de facto abrogation by

really to be about germaneness, for each time it argues coercion the argument resolves to 'that has nothing to do with disability.' If any issue of coercion, which Petitioner never pressed below, is present here, it is, given the undeveloped factual record, not well-presented.

Petitioner seeks to present to this Court a very different case from that decided below. This truly is a case where, as the Court has often cautioned, "the argument as to coercion is shown to be more rhetoric than fact." South Dakota v. Dole, 483 U.S. at 211 (Rehnquist, J.), drawing upon Steward Machine Co. v. Davis, 301 U.S. at 589-90 (Cardozo, J.).

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imposing on all state agencies a Hobson's choice between forfeiture of every last nickel of federal funding, no matter how unrelated to the federal interest asserted in defense of the putative waiver." Pet. at 12. "But under the court of appeals' decision, Congress could compel the States to do all of these things and more—by subjecting all of their agencies to non-germane and coercive funding conditions." Pet. at 13.

CONCLUSION

For the above stated reasons, the C. family respectfully requests that the Court deny a writ of certiorari here.

Respectfully submitted,

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No. 00-1488

In the Supreme Court of the United States

ARKANSAS DEPARTMENT OF EDUCATION, PETITIONER

v.

JIM C., INDIVIDUALLY AND AS PARENT AND NEXT FRIEND OF J.C., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner is subject to suit for disability discrimination under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (1994 & Supp. V 1999), because it waived its Eleventh Amendment immunity when it applied for and accepted federal financial assistance.

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In the Supreme Court of the United States

No. 00-1488

ARKANSAS DEPARTMENT OF EDUCATION, PETITIONER

v.

JIM C., INDIVIDUALLY AND AS PARENT AND NEXT FRIEND OF J.C., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-12a) is reported at 235 F.3d 1079. The opinion of the panel of the court of appeals (Pet. App. 16a-38a) is reported at 189 F.3d 745. The opinion of the district court (Pet. App. 39a-47a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 2000. The petition for a writ of certiorari was filed on March 22, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 504 of the Rehabilitation Act of 1973 prohibits any "program or activity receiving Federal financial assistance" from "subject[ing any person] to discrimination" on the basis of disability. 29 U.S.C. 794(a) (1994 & Supp. V 1999). Individuals have a private right of action for damages against entities receiving federal funds that violate this prohibition. See *Olmstead* v. *L.C.*, 527 U.S. 581, 590 n.4 (1999); *Miener* v. *Missouri*, 673 F.2d 969, 973-974 (8th Cir.), cert. denied, 459 U.S. 909 (1982).

In 1984, this Court held that Section 504 as written required only the "program or activity" that actually received federal funds to comply with the statutory nondiscrimination mandate. See *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624, 636 (1984). In response to *Darrone* and *Grove City College* v. *Bell*, 465 U.S. 555, 573-574 (1984), decided the same day, Congress engaged in extensive hearings and deliberations that culminated in the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28. That statute defined the term "program or activity" in Section 504 to mean, in relevant part,

> all of the operations of—
>
> (1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or
>
> (B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

> any part of which is extended Federal financial assistance.

29 U.S.C. 794(b). Similar definitions were added to Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d-4a, and Title IX of the Education Amendments of 1972, 20 U.S.C. 1687, which prohibit discrimination on the basis of race and sex, respectively, by programs or activities that receive federal financial assistance.

In 1985, this Court held that Section 504 was not clear enough to evidence Congress's intent to authorize private damage actions against state entities. See *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 245-246 (1985). In response to *Atascadero*, Congress enacted 42 U.S.C. 2000d-7 as part of the Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, Tit. X, § 1003, 100 Stat. 1845. Section 2000d-7 provides in pertinent part:

> A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], title IX of the Education Amendments of 1972 [20 U.S.C. 1681 *et seq.*], the Age Discrimination Act of 1975 [42 U.S.C. 6101 *et seq.*], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d *et seq.*], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

2. Respondents Jim and Susan C. are parents of a child with autism enrolled in public school in Arkansas. Pet. App. 40a. Petitioner is a state education agency that accepts federal financial assistance. *Id.* at 28a n.6. Respondents filed a complaint alleging, *inter alia*, that the local school district and petitioner had violated

Section 504 and the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.* Pet. App. 41a-42a. Petitioner moved to dismiss the claims on the ground that they were barred by the Eleventh Amendment or, in the alternative, to enter summary judgment on the merits. *Id.* at 42a. The district court denied the motion to dismiss, concluding that Congress has validly abrogated States' immunity to IDEA and Section 504 claims pursuant to Section 5 of the Fourteenth Amendment. *Id.* at 44a-45a. The court placed petitioner's summary judgment motion in abeyance in light of petitioner's announced intention to file an interlocutory appeal. *Id.* at 46a.

3. Petitioner took an interlocutory appeal of the denial of Eleventh Amendment immunity. See *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993). The United States intervened, pursuant to 28 U.S.C. 2403(a), to defend the constitutionality of the abrogation provisions. A panel of the court of appeals reversed with regard to Section 504. Pet. App. 16a-38a.[1] The panel held that Section 504 was not a valid exercise of Congress's power to enforce the Equal Protection Clause. *Id.* at 31a-35a. The panel then articulated three conditions that must be met for a Spending Clause statute validly to condition the receipt of federal funds on a waiver of Eleventh Amendment immunity: "(1) the federal spending program must represent a valid exercise of Congress's spending power; (2) the statute creating the federal spending

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[1] Relying on prior circuit precedent, the panel upheld the waiver requirement in IDEA as valid Spending Clause legislation, Pet. App. 27a-28a, in a portion of the decision not vacated for rehearing en banc, *id.* at 15a. Petitioner has not sought further review of that holding. Pet. 5 n.2.

program must contain a clear, unambiguous warning that Congress intends to exact waiver of Eleventh Amendment immunity as a condition for participating in the program; and (3) the state must have participated in the federal spending program." *Id.* at 36a.

The panel held that Section 504 "fails the first requirement because it is not a valid exercise of Congress's spending power." Pet. App. 36a. In the panel's view, Section 504 required the entire State to waive its immunity to Section 504 suits if it receives any federal funding. *Id.* at 37a. It found such a condition "amounts to impermissible coercion" because it "does not give Arkansas, or any other state, a meaningful choice." *Ibid.*

4. On the petition for rehearing by the United States and private respondents, the court granted rehearing en banc and vacated the opinion and judgment regarding Section 504 and the Spending Clause. Pet. App. 14a-15a. The en banc court affirmed the district court's judgment. *Id.* at 1a-12a.

The court held that, contrary to the panel's understanding, "the State itself as a whole" is not covered by Section 504 merely because some part of the State receives federal financial assistance. Pet. App. 3a, 6a. Instead, Section 504 is agency-specific and "acceptance of funds by one state agency therefore leaves unaffected both other state agencies and the State as a whole." *Id.* at 4a. Thus, "[a] State and its instrumentalities can avoid Section 504's waiver requirement on a piecemeal basis, by simply accepting federal funds for some departments and declining them for others." *Ibid.* Based on that reading of Section 504, the court found that it was not unconstitutionally coercive. *Id.* at 5a-6a. While declining federal funds might be "politically painful" to petitioner, the court refused to find

that the offer of federal funds "compels Arkansas's choice" to accept the funds with the attendant non-discrimination and waiver condition. *Id.* at 5a.

Judge Bowman, writing for himself and three other judges, dissented. Pet. App. 7a-12a. He did not dispute the majority's holding that Section 504 is agency-specific. See, *e.g.*, *id.* at 10a (stating that "the condition imposed in this case * * * go[es] * * * to all federal funds received by the Arkansas Department of Education"). In his view, however, Section 504 was not valid Spending Clause legislation for two reasons. First, he believed that "the financial inducement offered by Congress * * * is coercive" because so much federal funding is at stake. *Id.* at 7a. Second, he argued that the condition placed on the federal funding was not sufficiently "related" to the purpose for which the funds were provided. *Id.* at 9a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. In addition, the case is apparently about to become moot, before this Court could dispose of the case if review were granted. Further review is therefore not warranted.

1. This case is about to become moot in the near future, long before this Court could rule on the question presented even if this Court provides for further review. Petitioner did not seek a stay of the mandate pending its petition for certiorari. See Fed. R. App. P. 41(d)(2). Therefore, the case returned to the jurisdiction of the district court, and, acting on petitioner's pending motion for summary judgment, the district court entered judgment for petitioner on the Section 504 claim the day after petitioner filed its petition for

certiorari. R. 94 (filed Mar. 23, 2001). On respondents' motion for reconsideration, R. 96 (filed Apr. 5, 2001), petitioner did not ask the district court to hold the case until this Court acted on its pending petition. Instead, it argued that the court had properly entered judgment in its favor and urged the court to deny the motion to reconsider. R. 97 & 98 (filed Apr. 9, 2001). The district court concurred and issued an amended opinion entering judgment for petitioner on April 27, 2001, which was entered on the docket on April 30, 2001 (R. 101, 102). The private respondents have stated that they "do not intend to file an appeal from the district court's decision." Br. in Opp. 4. Accordingly, this case has apparently been finally resolved on its merits and it will become moot on June 29, 2001, when respondents' time for appeal expires.[2] The mootness of the case will result from petitioner's actions.[3]

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[2] Because the United States intervened to defend the constitutionality of the abrogation, it is a "party" to the case and, thus, respondents have sixty days to file a notice of appeal from the entry of the amended opinion and order. See Fed. R. App. P. 4(a)(1)(B); *United Steelworkers of Am.* v. *Jones & Lamson Mach. Co.*, 854 F.2d 629, 630 (2d Cir. 1988); cf. *Rochester Methodist Hosp.* v. *Travelers Ins. Co.*, 728 F.2d 1006, 1011-1012 (8th Cir. 1984).

[3] The long-standing position of the United States has been that, if a case becomes moot during the pendency of a petition for certiorari, vacatur of the lower court's decision is not appropriate if the case would not have warranted review on the merits. See, *e.g.*, U.S. Br. in Opp. at 5-8, *Velsicol Chem. Corp.* v. *United States*, 435 U.S. 942 (1978) (No. 77-900); U.S. Br. in Opp., *Enron Power Mktg., Inc.* v. *Northern States Power Co.*, 528 U.S. 1182 (2000) (No. 99-916). Although this Court has never expressly endorsed that standard, the Court has denied certiorari in a number of such cases (including *Velsicol* and *Enron*) consistently with that rule. The Court therefore "has seemingly accepted the suggestion of the Solicitor General that it need not consider the often difficult

2. In any event, the court of appeals' ruling that petitioner was not immune under the Eleventh Amendment to private suits alleging violations of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (1994 & Supp. V 1999), is both correct and consistent with the decisions of this Court and every court of appeals that has addressed the question. This Court recently denied a petition for a writ of certiorari in *George Mason*

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question of mootness at the certiorari stage when a case is otherwise not worthy of review." See Robert Stern et al., *Supreme Court Practice* 724 & n.29 (7th ed. 1993). Because, for the reasons stated in the text, the decision below does not warrant further review, mootness should not cause this Court to vacate the judgment of the court of appeals.

Vacatur of the decision below would be inappropriate in any event, because the mootness of the case is in large part attributable to petitioner. See *U.S. Bancorp Mortgage Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 25-26 (1994). It is "petitioner's burden, as the party seeking relief from the status quo of the appellate judgment, to demonstrate * * * equitable entitlement to the extraordinary remedy of vacatur." *Id.* at 26. As we note in the text, petitioner did not seek a stay of the court of appeals' mandate and, even while its petition for certiorari was pending, supported the district court's entry of judgment on its behalf. In such circumstances, the public interest in preserving judicial precedents issued while a case-or-controversy existed, *ibid.*, and "the orderly operation of the federal judicial system," *id.* at 27, counsel against vacating an en banc appellate decision simply because petitioner was able to prevail in the district court on the merits while its petition regarding immunity was pending in this Court. Cf. *Mahoney* v. *Babbitt*, 113 F.3d 219, 221-222 (D.C. Cir. 1997) (declining to vacate expired appellate order because losing party was responsible for mootness by failing to seek stay from Supreme Court while order was in effect); *Arthur* v. *Manch*, 12 F.3d 377, 381 (2d Cir. 1993) (declining to vacate judgment that became moot during pendency of appeal because "the mootness of the appeal was a direct result of the Mayor's inaction [in failing to seek a stay or an expedited appeal] rather than of happenstance").

University v. *Litman*, 528 U.S. 1181 (2000) (No. 99-596), a case presenting virtually identical legal claims. See also *Kansas* v. *United States*, 121 S. Ct. 623 (2000) (No. 00-329) (denying petition for certiorari by State claiming that Spending Clause statute was unconstitutionally coercive). Accordingly, further review is unwarranted.

a. Petitioner does not argue that Congress did not clearly express its intention in 42 U.S.C. 2000d-7 to condition the receipt of federal funds on the recipient's waiver of its Eleventh Amendment immunity to Section 504 suits. See, *e.g*, *Seminole Tribe* v. *Florida*, 517 U.S. 44, 55 (1996). Nor does the petition argue that Congress may never condition the receipt of federal funds on the recipient's waiver of Eleventh Amendment immunity. Any such argument would be foreclosed by this Court's consistent recognition of the principle that "[w]here the recipient of federal funds is a State, as is not unusual today, the conditions attached to the funds by Congress may influence a State's legislative choices." *New York* v. *United States*, 505 U.S. 144, 167 (1992). This Court has recognized that principle both when the condition attached to the funds is a waiver of Eleventh Amendment immunity[4] and when the condition affects other sovereign prerogatives of a State.[5] All of the courts of appeals to address the

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[4] See *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 678-679 n.2 (1999) (accepting that "a waiver [of Eleventh Amendment immunity] may be found in a State's acceptance of a federal grant"); *Petty* v. *Tennessee-Mo. Bridge Comm'n*, 359 U.S. 275 (1959) (accepting Congress's conditioning approval of bistate compact on consent to suit of bistate commission).

[5] See *New York* v. *United States*, 505 U.S. at 169, 173 (holding that a statute that conditioned funding upon the States' "regulat-

issue have similarly held that, so long as Congress has made its intentions clear, it has the power to condition the receipt of federal funds on a state recipient's waiver of Eleventh Amendment immunity with respect to the program or activity that receives the federal assistance.[6]

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ing pursuant to federal standards" was "well within the authority of Congress" under the Spending Clause); *South Dakota* v. *Dole*, 483 U.S. 203, 210 (1987) (even assuming that Constitution vested authority over drinking age solely in the States, Congress could condition the receipt of federal money on States' enacting legislation setting drinking age); *Oklahoma* v. *United States Civil Serv. Comm'n*, 330 U.S. 127, 143 (1947) (Congress could condition the receipt of federal money on requirement that state officials who administer funds abstain from active political partisanship); see also *Printz* v. *United States*, 521 U.S. 898, 936 (1997) (O'Connor, J., concurring) (stating that although Congress cannot require state officials to enforce Brady Handgun Violence Protection Act under the Commerce Clause, it is "free to amend the interim program to provide for its continuance on a contractual basis with the States if it wishes, as it does with a number of other federal programs").

[6] See *Stanley* v. *Litscher*, 213 F.3d 340, 344 (7th Cir. 2000) (Section 504); *Pederson* v. *Louisiana State Univ.*, 213 F.3d 858, 875-876 (5th Cir. 2000) (Title IX); *Board of Educ.* v. *Kelly E.*, 207 F.3d 931, 935 (7th Cir.) (IDEA), cert. denied, 121 S. Ct. 70 (2000); *Sandoval* v. *Hagan*, 197 F.3d 484, 493-494 (11th Cir. 1999) (Title VI), rev'd on other grounds, 121 S. Ct. 1511 (2001); *Litman* v. *George Mason Univ.*, 186 F.3d 544, 554 (4th Cir. 1999) (Title IX), cert. denied, 528 U.S. 1181 (2000); *Little Rock Sch. Dist.* v. *Mauney*, 183 F.3d 816, 831-832 (8th Cir. 1999) (IDEA); *Clark* v. *California*, 123 F.3d 1267, 1271 (9th Cir. 1997) (Section 504), cert. denied, 524 U.S. 937 (1998); *Department of Educ.* v. *Katherine D.*, 727 F.2d 809, 818-819 (9th Cir. 1983) (Education for All Handicapped Children Act of 1975), cert. denied, 471 U.S. 1117 (1985); *Scanlon* v. *Atascadero State Hosp.*, 735 F.2d 359, 361-362 (9th Cir. 1984) (Section 504), rev'd due to the absence of a clear statement, 473 U.S. 234 (1985); *Florida Nursing Home Ass'n* v. *Page*, 616 F.2d 1355, 1363 (5th Cir. 1980) (Medicaid), rev'd due to the absence

b. Petitioner does contend (Pet. 7-11) that, even if Congress may condition the receipt of federal funds on a waiver of immunity for valid Spending Clause statutes, Congress exceeded its authority under the Spending Clause by requiring an entire state agency to comply with Section 504's prohibition on discrimination against persons with disabilities if the agency accepts any federal financial assistance.

This Court in *South Dakota* v. *Dole*, 483 U.S. 203 (1987), identified four limitations on Congress's Spending Power. First, the Spending Clause by its terms requires that Congress legislate in pursuit of "the general welfare." *Id.* at 207. Second, if Congress conditions the States' receipt of federal funds, it "must do so unambiguously . . ., enabling the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Ibid.* (quoting *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981)). Third, the Supreme Court's cases "have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'" *Ibid.* And fourth, the obligations imposed by Congress may not induce a governmental recipient to violate any independent constitutional provisions. *Id.* at 209-211.

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of a clear statement *sub nom. Florida Dep't of Health & Rehabilitative Servs.* v. *Florida Nursing Home Ass'n*, 450 U.S. 147 (1981); see also *Premo* v. *Martin*, 119 F.3d 764, 770-771 (9th Cir. 1997) (State participation in Randolph-Sheppard Vending Stand Act constitutes a waiver of Eleventh Amendment immunity), cert. denied, 522 U.S. 1147 (1998); *Delaware Dep't of Health & Social Servs.* v. *United States Dep't of Educ.*, 772 F.2d 1123, 1138 (3d Cir. 1985) (same).

Petitioner does not contest that Section 504 is in the general welfare, see *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 443-444 (1985) (discussing Section 504 with approval), or that the conditions on federal funds are sufficiently clear, see *School Bd.* v. *Arline*, 480 U.S. 273, 286 n.15 (1987) (describing Section 504 as an "antidiscrimination mandate"). See Pet. 7 ("Of the several limitations sketched in [*Dole*], two are particularly relevant here."). Likewise, petitioner does not submit that Section 504 requires it to engage in unconstitutional conduct. Instead, petitioner first contends (Pet. 7-8) that the condition embodied in Section 504—that if an agency accepts federal financial assistance, it must not discriminate on the basis of disability—is not sufficiently "related" to at least some of the federal financial assistance it receives.

The "relatedness" issue petitioner seeks to raise is not squarely posed by this case. The complaint in this case alleges that petitioner has discriminated against a child with a disability. Yet petitioner has also conceded (see Pet. App. 28a n.6) that it receives federal financial assistance under the IDEA, 20 U.S.C. 1400 *et seq.*, a statute enacted to provide States with federal funds to educate children with disabilities. See 20 U.S.C. 1411(f) (Supp. V 1999) (States may retain a percentage of the federal grant money to pay for costs of state administration and to fund a variety of state-level activities). Thus, petitioner accepts federal funds intended to assist in the education of children with disabilities, the precise subject matter of respondents' complaint. Accordingly, petitioner's "relatedness" claim is not presented by the facts of this case. Cf. *Salinas* v. *United States*, 522 U.S. 52, 60-61 (1997) (declining to address facial validity of Spending Clause provision when it was clear that it was valid as applied); Pet. 5 n.2 (not challenging court of

appeals' judgment upholding constitutionality of waiver of Eleventh Amendment immunity for claims arising under IDEA).

In any event, there can be no doubt that Congress, under the Spending Clause, can require an agency that elects to receive federal financial assistance to promise not to discriminate on the basis of disability in any of its operations. In *Lau* v. *Nichols*, 414 U.S. 563 (1974), the Court held that Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, was a valid exercise of the Spending Power. "The Federal Government has power to fix the terms on which its money allotments to the States shall be disbursed. Whatever may be the limits of that power, they have not been reached here." 414 U.S. at 569 (citations omitted).[7] The Court reached a similar conclusion in *Grove City College* v. *Bell*, 465 U.S. 555 (1984). In *Grove City*, the Court addressed whether Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, which prohibits sex discrimination by recipients of federal financial assistance, infringed on the college's First Amendment rights. The Court rejected that claim, holding that "Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept." 465 U.S. at 575.

Petitioners urge (Pet. 9 n.3) that the condition embodied in Section 504's non-discrimination requirement is not "related" because not all the funds are intended "to assist[] or prevent[] discrimination against the

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[7] In *Alexander* v. *Sandoval*, 121 S. Ct. 1511, 1519 (2001), this Court noted that it has "rejected *Lau*'s interpretation of § 601 [of the Civil Rights Act of 1964, 42 U.S.C. 2000d] as reaching beyond intentional discrimination." The Court did not cast doubt on the Spending Clause holding in *Lau*.

handicapped." But the Constitution does not require that Congress provide funds to combat discrimination or help minorities if it wishes to attach a non-discrimination requirement to its funds. In neither *Lau* nor *Grove City* was there any suggestion that the federal funds received were targeted towards alleviating discrimination. In fact, it is clear that the financial assistance at issue in *Grove City* was simply general financial aid that had no relationship to programs to combat sex discrimination. 465 U.S. at 559, 565 n.13. Instead, those cases make clear that Congress has a legitimate interest in preventing the use of any of its funds to "encourage[], entrench[], subsidize[], or result[] in," *Lau*, 414 U.S. at 569 (internal quotation marks omitted), discrimination against persons otherwise qualified on the basis of criteria Congress has determined are irrelevant to the receipt of public services, such as race, gender, and disability. See *United States* v. *Louisiana*, 692 F. Supp. 642, 652 (E.D. La. 1988) (three-judge court) ("[T]he condition imposed by Congress on defendants [in Title VI], that they may not discriminate on the basis of race in any part of the State's system of public higher education, is directly related to one of the main purposes for which public education funds are expended: equal education opportunities to all citizens." (footnote omitted)).[8]

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[8] Petitioner's suggestion that conditions cannot be "related" to the purpose of the federal spending unless they involve the subject-matter of a particular grant also conflicts with cases outside the civil rights area upholding as valid exercises of the Spending Clause conditions not tied to a particular spending program. See *Oklahoma* v. *United States Civil Serv. Comm'n*, 330 U.S. at 129 n.1 (upholding an across-the-board requirement in the Hatch Act that no state employee whose principal employment was in connection with any activity that was financed in whole or

By imposing the nondiscrimination condition on all of the operations of the state agency that receives any federal funds, Congress elected to rely on the State's own governmental framework in determining the proper breadth of coverage. State law establishes the allocation of operations and functions among departments of the state government. Congress reasonably could have presumed that States normally place related operations with overlapping goals, constituencies, and resources in the same department. In most States, agencies are run by an elected person (such as the Attorney General or Secretary of State) or a political appointee. That person is normally charged by state law with the initial decision whether his agency will accept federal funds for various programs or activities.[9] Thus, either the state legislature or a politically responsible official charged with the overall authority for the management and budgeting of a set of programs or activities, put together by the State itself because of their related attributes, determines whether to accept federal funds. That level of coverage—broader than simply the discrete program that nominally receives the funds, but narrower than the entire state govern-

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in part by the United States could take "any active part in political management"); *Salinas*, 522 U.S. at 60-61 (upholding application of federal bribery statute covering entities receiving more than $10,000 in federal funds).

[9] In Arkansas, before a state agency may apply for federal funds, it must submit a report to the Department of Finance and Administration evaluating the costs of participating in the federal program. See Ark. Code Ann. § 19-4-1903 (Michie 1999). The Director of the Department of Finance and Administration submits this information to the General Assembly, see *id.* § 19-4-1907, and the General Assembly's inaction constitutes authorization to participate, see *id.* § 19-4-1908(b).

ment—is an appropriate means of assuring that no federal money supports or facilitates programs that are not accessible to people with disabilities. Cf. *Rust* v. *Sullivan*, 500 U.S. 173, 197-199 (1991) (Congress may constitutionally require that a private entity that receives federal funds not engage in conduct Congress does not wish to subsidize so long as recipient may restructure its operations to separate its federally-supported activities from other activities).

Petitioner also suggests (Pet. 8-10) that Section 504 is unconstitutionally coercive. This Court pointed out in *Dole* that its "decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" 483 U.S. at 211 (quoting *Steward Mach. Co.* v. *Davis*, 301 U.S. 548, 590 (1937)). But the only case the Court cited was *Steward Machine*, a decision that expressed doubt about the viability of such a theory. 301 U.S. at 590 (finding no undue influence even "assum[ing] that such a concept can ever be applied with fitness to the relations between state and nation"); cf. Restatement (Third) of Foreign Relations Law § 331 cmt. d (1987) ("economic or political pressure" can never constitute "coercion" sufficient to invalidate agreements between sovereigns). Every congressional spending statute "is in some measure a temptation." *Dole*, 483 U.S. at 211. As the Court recognized, however, "to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties." *Ibid.* In *Dole* the Court reaffirmed the assumption, founded on "a robust common sense," that the States voluntarily exercise their power of choice when they accept or decline the conditions attached to the receipt of federal funds. *Ibid.* (quoting *Steward Mach.*, 301 U.S. at 590).

Petitioner has not identified anything about Section 504 that overbears a sovereign State's ability to say "no" to the offer of federal funds for any agency it does not want to be subjected to the non-discrimination requirements of Section 504. Petitioner notes (Pet. 10) that it will have to elect not to seek federal funds for an entire agency if it wishes the agency to be free of Section 504's obligation not to discriminate and attendant waiver of immunity. That is similar not only to Title VI and Title IX, statutory schemes whose legality was recognized in *Lau* and *Grove City*, but also the Equal Access Act, 20 U.S.C. 4071 *et seq.*, a statute that prohibits any public secondary school that receives any federal financial assistance and maintains a "limited open forum" from denying "equal access" to students based on the content of their speech. 20 U.S.C. 4071(a). In interpreting the scope of the Equal Access Act in *Board of Education* v. *Mergens*, 496 U.S. 226 (1990), this Court rejected the school district's argument that the Act as interpreted unduly hindered local control, noting that

> because the Act applies only to public secondary schools that receive federal financial assistance, a school district seeking to escape the statute's obligations could simply forgo federal funding. Although we do not doubt that in some cases this may be an unrealistic option, * * * [complying with the Act] is the price a federally funded school must pay if it opens its facilities to noncurriculum-related student groups.

496 U.S. at 241 (citation omitted). Similarly, compliance with Section 504 and waiver of the State's sovereign immunity with respect to claims brought against a particular agency is the price that agency must pay if it

elects to remain federally funded. See also *North Carolina ex rel. Morrow* v. *Califano*, 445 F. Supp. 532, 536 (E.D.N.C. 1977) (three-judge court) (threat of exclusion from 40 federal spending programs unless State enacts particular legislation not "'coercive' in the constitutional sense"), aff'd mem., 435 U.S. 962 (1978). In addition, the State's ability to define the boundaries and functions of its state agencies also minimizes the threat of coercion.

Petitioner also claims (Pet. 10) that the amount of money involved makes the statutory scheme unduly coercive. We accept petitioner's assertion (Pet. 9 n.3), unsupported by anything in the record, that, like most government entities, it receives grants from a vast array of federal programs established by Congress. Given the amount it claims to receive from the federal government, petitioner has apparently been successful in obtaining these grants, presumably in varying amounts. It does not follow, however, that because petitioner has elected to apply for and accept a number of grants that the federal government's authority to impose conditions on each grant it offers is somehow diminished. If the federal government is justified in imposing conditions on modest expenditures of federal resources, it should not be less justified in imposing those conditions when the amount of federal money increases. As the First Circuit has explained, "[w]e do not agree that the carrot has become a club because rewards for conforming have increased. It is not the size of the stakes that controls, but the rules of the game." *New Hampshire Dep't of Employment Sec.* v. *Marshall*, 616 F.2d 240, 246 (1st Cir.), appeal dismissed and cert. denied, 449 U.S. 806 (1980).

Thus, the choice imposed by Section 504 is not impermissibly "coercive" in the constitutional sense.

State officials are constantly forced to make difficult decisions regarding competing needs for limited funds. While it may not always be easy to decline federal funding, each department or agency of the State, under the control of state officials, is free to decide whether it will accept the federal funds with the Section 504 and waiver "string" attached, or simply decline the funds. See *Grove City*, 465 U.S. at 575; *Kansas* v. *United States*, 214 F.3d 1196, 1203-1204 (10th Cir.) ("In this context, a difficult choice remains a choice, and a tempting offer is still but an offer. If Kansas finds the * * * requirements so disagreeable, it is ultimately free to reject both the conditions and the funding, no matter how hard that choice may be. Put more simply, Kansas' options have been increased, not constrained, by the offer of more federal dollars." (citation omitted)), cert. denied, 121 S. Ct. 623 (2000).

Because one of the critical purposes of the Eleventh Amendment is to protect the "financial integrity of the States," *Alden* v. *Maine*, 527 U.S. 706, 750 (1999), it is perfectly appropriate to permit each State to make its own cost-benefit analysis for each state agency it has established and determine whether to accept the federal money with the condition that that agency can be sued in federal court, or forgo the federal funds. See *New York* v. *United States*, 505 U.S. at 168. But once that choice is made, "[r]equiring States to honor the obligations voluntarily assumed as a condition of federal funding * * * simply does not intrude on their sovereignty." *Bell* v. *New Jersey*, 461 U.S. 773, 790 (1983).[10]

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[10] Although petitioner cites (Pet. 13-14) the Fourth Circuit's decision in *Virginia Department of Education* v. *Riley*, 106 F.3d 559 (1997) (en banc), petitioner wisely does not contend that there

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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is a conflict in the circuits. In *Riley*, a majority of the court held as a matter of statutory interpretation that the IDEA did not limit the State's discretion in deciding whether to educate certain children with disabilities who had been expelled from school. *Id.* at 561. In making that determination, a plurality of the court stated that reaching this result permitted it to avoid what the plurality perceived as a "substantial constitutional question" regarding the validity of IDEA under the Spending Clause. *Id.* at 561, 569-570. Even that tentative view did not garner the support of a majority of the court.

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IN THE
Supreme Court of the United States

ARKANSAS DEPARTMENT OF EDUCATION,
Petitioner,

v.

JIM C, INDIVIDUALLY AND AS PARENT AND NEXT FRIEND OF J.C., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONERS

The Eighth Circuit in this case held that the Spending Clause permits Congress to compel state agencies, as a condition for receiving any federal funding for any purpose, to waive Eleventh Amendment defenses to suits under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. Respondents do not dispute the obvious importance of that holding. Instead, respondents argue that further review is unwarranted because this case might soon become moot and because the Eighth Circuit' six-to-four decision was correct on the merits. Neither contention has merit.

1. This case presently is not moot. As respondents explain, the district court granted summary judgment for petitioner and, on April 27, 2001, denied the private respondents' motion for reconsideration. However, the private respondents, despite asserting that they "do not *intend* to file an appeal" from that decision (Opp'n at 4 (emphasis added)), have made no firm commitment to abandon their appeal rights. And the federal respondents contend (Gov't Resp. at 7 & n.2) that the time for filing an appeal is governed by the sixty-day period set forth in Fed. R. App. P. 4(a)(1)(B), which would make the notice of appeal due on June 29, 2001. Until that time, respondents remain free to appeal the summary judgment rejecting their Section 504 claims, and petitioner wishes to resist any such appeal on Eleventh Amendment grounds.

The possibility that the case will become moot on June 29 does not counsel against granting the petition for certiorari. If the private respondents *do* file a notice of appeal by June 29, the mootness alleged by respondents simply will not occur. On the other hand, if the private respondents do *not* file a notice of appeal by June 29, the case will then become moot. Because any mootness would occur on June 29, there is no possibility of wasted effort in needlessly briefing the Spending Clause issue on the merits. And because the mootness inquiry will turn simply on whether the private respondents choose to file a notice of appeal, there is no possibility of collateral

litigation on that question.[1]

2. On the merits, respondents' analysis confirms both the breadth and indefensibility of the court of appeals' decision. As explained in the petition for certiorari, *South Dakota v. Dole*, 483 U.S. 203 (1987), imposes distinct germaneness and non-coercion requirements on Congress's Spending Clause power to attach conditions to federal expenditures. Nonetheless, the United States contends (Gov't Resp. at 15-16) that the germaneness requirement is satisfied despite conceding that the funding conditions at issue apply to "*all* of the operations of the state agency that receives *any* federal funds" (emphases added). The United States also contends (*id.* at 17-18) that, despite the breadth of these conditions, a state agency may simply "say 'no' to the offer of federal funds" and, further, that the amount of funds subject to these conditions is irrelevant because, "[i]f the federal government is justified in imposing conditions on modest expenditures of federal resources, it should be no less justified in imposing those conditions when the amount of federal money

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[1] If this case were to become moot before its final disposition in this Court, vacatur of the Eighth Circuit's decision would be appropriate. "'The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot . . . pending [the Court's] decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss.'" *U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 22 (1994), quoting *United States v. Munsingwear*, 340 U.S. 36, 39 (1950). The federal respondents err in contending (Gov't Resp. at 7 n.3) that *Munsingwear* is inapplicable because the mootness here would be "in large part attributable to petitioner." In *Bonner Mall*, this Court held that vacatur was inappropriate where the party seeking vacatur, by having settled the case, engaged in a "voluntary forfeiture of review." 513 U.S. at 26. Here, by contrast, the mooting event would be a "voluntary forfeiture of review" *by respondents*. In that circumstance, *Munsingwear* is clearly applicable. *See Arizonans For Official English v. Arizona*, 520 U.S. 43, 72 (1997) (vacatur appropriate where mootness caused by "unilateral action of the party who prevailed in the lower court").

increases." That analysis has no limiting principles. If it is correct, then *Dole*'s germaneness and non-coercion requirements are a dead letter, and the Spending Clause will have "render[ed] academic the Constitution's other grants and limits of federal authority." *New York v. United States*, 505 U.S. 144, 167 (1992).

In truth, it is not surprising that respondents would resort to such broad rationales to defend the court of appeals' opinion on the merits. On its face, the statute at issue purports to compel *every* state agency that receives *any* amount of federal funds for *any* purpose to waive Eleventh Amendment defenses to claims under *any* federal statute prohibiting discrimination by recipients of federal funds (including Section 504). 42 U.S.C. § 2000d-7(a). But *no* state agency refuses *all* federal funds. Accordingly, under the construction of the Spending Clause adopted below, Congress could overcome *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), and *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), among other decisions, through the use of non-germane and coercive spending conditions. This Court should not, without even considering the question, permit the Spending Clause to become such a fertile source of "waiver" that can only be described as abrogation-by-other-means.

3. Respondents offer a few perfunctory and meritless contentions why the Spending Clause issue is not cleanly presented.

The federal respondents so contend (Gov't Resp. at 12) because petitioner accepts federal financial assistance under the Individuals With Disabilities Education Act ("IDEA"). Such acceptance might trigger a waiver of Eleventh Amendment defenses to claims *under the IDEA* by operation of 20 U.S.C. § 1403 (Pet. App. 29a), but that analysis does not affect the separate question of the putative waiver of Eleventh Amendment defenses to claims *under Section 504* by operation of 42 U.S.C. § 2000f-7(a).

The private respondents complain (Opp'n at 4) about "[t]he absence of any factual record concerning federal financial assistance received by" petitioner. However, in rejecting petitioner's Eleventh Amendment defense in the context of resolving a motion to dismiss (Pet. App. 2a), the Eighth Circuit necessarily held that 42 U.S.C. § 2000f-7(a) effected a valid waiver regardless of the facts. If that conclusion rests on a misconstruction of the Spending Clause, this Court should say so and, if necessary, remand for factual development in light of correct standards of germaneness and non-coercion.

Finally, the private respondents also contend (Opp'n at 11) that the petition for certiorari "seeks to present to this Court a very different case from that decided below." Even a cursory review of the decision below rebuts that contention. *E.g.* Pet. App. 6a ("The choice is up to the State: either give up federal aid to education, or agree that the Department of Education can be sued under Section 504. We think the Spending Clause allows Congress to present States with this sort of choice."). It is precisely that question -- the importance of which respondents nowhere dispute -- on which petitioner seeks further review in this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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